148 U.S. 262

RECORD, CASE No. 13,710.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 134.

FRIEDRICH HOHORST, APPELLANT,

vs.

THE HAMBURG-AMERICAN PACKET COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 8, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 24, 1892.

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1 The President of the United States of America to Hamburg-American Packet Company, Henry R. Kunhardt, Sr., Henry
[L. S.] R. Kunhardt, Jr., George H. Diehl, Arend Behrens, and William Koester, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, in equity, on the first Monday of November, A. D. 1888, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Friedrich Hohorst, and do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, at the city of New York, on the 15th day of September, in the year one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth.

JOHN A. SHIELDS, *Clerk.*

LOGAN & CLARK,
Complainant's Sol'rs.

The defendants are required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of November, 1888, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

2 (Endorsed:) I hereby certify that on the 17th day of September, 1888, at the city of New York, in my district, I personally served the within subp. in equity upon the within-named defendant, Henry R. Kunhardt, Sr., by exhibiting to him the within original and at the same time leaving with him a copy thereof. Dated Sept. 17, 1888. M. T. McMahon, United States marshal, southern district of New York, per John E. Dowley, deputy. I hereby certify that on the 17th day of September, 1888, at the city of New York, in my district, I personally served the within supb. in equity upon the within-named defendant, Hamburg-American Packet Company, by exhibiting to Henry R. Kunhardt, Sr., general agent for said company, the within original and at the same time leaving with him a copy thereof. Dated Sept. 17, 1888. M. T. McMahon, United States marshal, southern district of New York, per John E. Dowley, deputy. U. S. circuit court. Filed Sept. 18, 1888. John A. Shields, clerk.

3 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. KUNHARDT, Sr., HENRY R. KUNHARDT, Jr., GEORGE H. DIEHL, AREND BEHRENS, and WILLIAM KOESTER, Defendants.
} In Equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Friedrich Hohorst, of New York city, and a citizen of the State of New York, brings this his bill of complaint against the Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and doing business in the city of New York; Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, citizens of the United States and residents of the State of New York, and Arend Behrens and William Koester, citizens of the United States and residents of the State of New Jersey.

And thereupon your orator complains and says that heretofore and before the date of the application for letters patent, as hereinafter mentioned, your orator, a citizen of the United States and then of New York city, in the State of New York, was the original and first inventor of a new and useful improvement in slings for
4 *-ventor of a new and useful improvement in slings for* packages not known or used by others and not patented or described in any printed publication before his invention or descovery thereof, and not in public use or on sale more than two years prior to his application for letters patent therefor.

And your orator further shows unto your honors that he having as aforesaid applied for letters patent of the United States for said improvement, and having fully and in all respects complied with all the requirements of the law in that behalf, letters patent for said improvement were duly issued to your orator by the United States, under the seal of the Patent Office, signed by the acting Secretary of Interior and countersigned by the acting Commissioner of Patents, bearing date the 10th day of October, 1871, and numbered 119,765—

Whereby was granted and secured to your orator and his heirs and assigns, for a term of seventeen years from the date thereof, the full and exclusive right and liberty of making, using, and vending to others to be used throughout the United States and the Territories thereof the said improvement in slings for packages, as by reference to said letters patent for said improvement, in court to be produced, will more fully and at large appear.

And your orator further shows that he is the sole and exclusive owner of said invention and the letters patent therefor, and is in full enjoyment of all the rights and privileges granted and secured
5 or intended to — packages not known or used by others and not patented or described in any printed publication before his

invention or discovery thereof and not in public use or on sale for more than two years prior to his application for letters patent therefor.

And your orator further shows unto your honors that he, being so as aforesaid the first and original inventor of said improvement, did, before the 10th day of October, 1871, apply in due form to the Commissioner of Patents of the United States for letters patent of the United States therefor.

And your orator further shows unto your honors that, he having as aforesaid applied for letters patent of the United States for said improvement and having fully and in all respects complied with all the requirements of the law in that behalf, letters patent for said improvement were duly issued to your orator by the United States, under the seal of the Patent Office, signed by the acting Secretary of the Interior and countersigned by the acting Commissioner of Patents, bearing date the 10th day of October, 1871, and numbered 119,765—

Whereby was granted and secured to your orator and his heirs and assigns, for the term of seventeen years from the date thereof, the full and exclusive right and liberty of making, using, and vending to others to be used throughout the United States and the Territories thereof the said improvement in slings for packages, as by reference to said letters patent for said improvement, in court to be produced, will more fully and at large appear.

And your orator further shows that he is the sole and ex-
6 clusive owner of said invention and the letters patent therefor, and is in full enjoyment of all the rights and privileges granted and secured or intended to be granted or secured thereby, and that said rights and privileges have been and are of great value to your orator.

And your orator further shows unto your honors that the defendants, well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator and to deprive him of the benefits and advantages which might and otherwise would accrue to him from said invention, and without the license or allowance and against the will of your orator, and in violation of your orator's rights, have made and used and allowed others to use, at divers times continuously during several years last past, at the city, county, and State of New York and elsewhere, slings for packages embracing and containing said patented invention and improvement, all in violation of the rights secured to your orator as aforesaid and to his irreparable loss and injury, by which he has been and still is being deprived of great gains and profits which he might and otherwise would have obtained, but which have been received and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings.

And your orator further shows unto your honors that the said defendants have derived and received and are still deriving and receiving from the aforesaid wrongful use of said invention large gains and profits, but what amount of such gains and profits have been so derived and received by said defendants your orator does

not know and cannot set forth, but prays that said defend-
7 ants may be required to make a discovery as to their use of said invention and of all gains and profits received by them therefrom or by means thereof.

And your orator further shows unto your honors that the said defendants have been warned and requested to desist and refrain from said infringement and said unlawful and wrongful acts, but that said warning and request and notice have been wholly disregarded by them, and that said defendants still continue the infringement and unlawful and wrongful acts as aforesaid.

And your orator further shows unto your honors that on or about the 1st day of February, 1887, the complainant filed his bill of complaint in equity against the Inman and International Steamship Company (Limited) in the United States circuit court for the second circuit and the southern District of New York, setting forth, among other things, the said letters patent No. 119,765, of the 10th day of October, 1871, and the infringement of the aforesaid letters patent by said defandants therein and praying an injunction and account against them; and the said defendants therein filed their answer to the said bill of complaint, denying, among other things, the validity of the said letters patent, and, issue being joined therein, the parties proceeded to take proofs, which were taken at length.

And your orator further shows unto your honors that, the proofs in said cause being taken, the cause was brought to a final hear-
8 ing on its merits in the month of April, 1888, before his honor Mr. Justice William J. Wallace, and was argued before him by the counsel for the respective parties, and that he, having duly considered the matter, rendered judgment thereupon in favor of the complainant, the decree being entered on the 6th day of April, 1888; and that the said court decided, among other things, that the said letters patent were valid in law; that the said complainant was the original and first inventor of the improvements patented as aforesaid and referred to in said bill of complaint, and perpetually enjoined the defendants therein from making, constructing, using, and vending to others to be used the said improvements patented as aforesaid, and ordered an account to be taken of the damages suffered by the complainant by reason of the infringement by the said defendants, and of the profits that had accrued to the said defendants therein from their infringement, as by reference to the record of the proceedings in said suit will more fully and at large appear.

In consideration whereof, and forasmuch as your orator can have no adequate relief except in this honorable court, to the end, therefore, that the said defendants herein may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their oath and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises, and to all the
9 several matters hereinbefore stated and charged, as fully and particularly as if separately interrogated as to each and every of said matters, and that they may be required to make discovery and disclosure of all gains and profits derived and received from

such unlawful and wrongful manufacture, construction, use, or sale, and that they be decreed to account for and with and to pay over to your orator the profits by them acquired and the damages suffered by your orator from the aforesaid unlawful and wrongful acts.

And may it please your honors, the premises considered, to grant unto your orator the writ of injunction, issuing out of and under the seal of this honorable court, permanently enjoining and restraining the said defendants, their agents, servants, workmen, employees, and attorneys and each and every of them, from directly or indirectly making, using, or selling or offering for sale any slings for packages containing or embodying said invention granted by said letters patent as aforesaid, and from infringing upon or violating the said letters patent by the making, use, or sale of said slings for packages or said invention or improvement in any way whatsoever.

And may it please your honors, the premises considered, to grant unto your orator the writ of subpœna, issued out of and under the seal of this honorable court, to be directed to the above-named defendants, thereby commanding them, at a certain day and under a certain penalty therein to be limited, personally to be and ap-
10 pear before your honors in this honorable court and then and there full, true, and perfect answers make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as your honors shall deem meet.

May it please your honors to grant to your orator a provisional or preliminary injunction, issuing out of and under the seal of this honorable court, enjoining and restraining the defendants, their attorneys, solicitors, clerks, servants, workmen, and agents, to the same purport, tenor, and effect hereinbefore prayed for in regard to the said permanent injunction.

And your orator will ever pray, &c.

F. HOHORST.

SALTER S. CLARK,
LOGAN & CLARK,
Complainant's Solicitors and of Counsel.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Friedrich Hohorst, being duly sworn, deposes and says that he is the complainant in the foregoing bill of complaint and has read the same and knows the contents thereof; that the said bill of complaint is true of his own knowledge except as to the matters which are therein alleged to be stated on information and belief, and as
11 to those matters he believes it to be true.

[L. S.] F. HOHORST.

Sworn to before me this 14th day of September, 1888.

[L. S.] THOMAS W, SMITH,
Notary Public, N. Y. Co.

(Endorsed:) United States circuit court, southern district of New York. Friedrich Hohorst, complainant, ag'st Hamburg-American Packet Company *et al.*, defendants. Bill of complaint. Logan & Clark, complainant's solicitors, 54 William street, New York city. U. S. circuit court. Filed Sep. 15, 1888. John A. Shields, clerk.

12 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens, and William Koester, Defendants. } In Equity.

Please take notice that the above-named defendants appear in the above-entitled cause, and that I am retained by and appear as solicitor for them therein.

Dated New York, Nov. 5th, 1888.

Yours, &c., WALTER D. EDMONDS,
Solicitor for Defendants,
No. 5 Beekman Street, New York City.

To John A. Shields, Esq., clerk of above-named court.

(Endorsed:) U. S. circuit court, so. dist. of New York. Frederick Hohorst, complainant, *vs.* The Hamburg-American Packet Company *et al.* Notice of appearance. Walter D. Edmonds, sol'r for def'ts, No. 5 Beekman St., N. Y. city. U. S. circuit court. Filed Nov. 5, 1888. John A. Shields, clerk.

13 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens, and William Koester, Defendants. } In Equity.

The demurrer of The Hamburg-American Packet Company, one of the defendants above-named, to the bill of complaint of Friedrich Hohorst, the above-named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill of complaint, and for cause of demurrer showeth that—

First. It appears by the said bill that the same is exhibited as against the defendant and the several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any

manner interested or concerned, and that it does not appear by said bill that said defendants or any of them or their
14 alleged infringement therein complained of are in any way connected, and that the said bill is altogether multifarious.

And for a further cause of demurrer showeth that—

Second. The said complainant hath not in and by his said bill made or stated such a case as entitles him in this court of equity to any discovery from this defendant or to any relief against it as to the matters contained in the said bill or any such matters, in that it appears by said bill that the above-named court has no jurisdiction of this defendant for the purpose of entertaining and conducting the above-mentioned cause against it.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur thereto, and to all the matters and things therein contained, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill of complaint, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

HAMBURG-AMERICAN PACKET CO.,
By KUNHARDT & CO., *Agents.*

WALTER D. EDMONDS,
Solicitor and of Counsel for Defendant.

Office and post-office address, No. 5 Beekman St., New York city.

15 I certify that in my opinion the foregoing demurrer of the Hamburg-American Packet Company to the bill of complaint of Friedrich Hohorst in the above-entitled cause is well founded in point of law and proper to be filed in the above cause.

WALTER D. EDMONDS,
Of Counsel for Defendant.

SOUTHERN DISTRICT OF NEW YORK, } *ss:*
City and County of New York, }

Arend Behrens, being duly sworn, says that he is an agent of the Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and that said company is a resident and citizen of said kingdom and is one of the defendants named in the above-entitled cause; that he has read said demurrer and knows the contents thereof, and that said demurrer is not interposed for delay, and that deponent is duly authorized to make this affidavit on behalf of said defendant company.

AREND BEHRENS.

Sworn to before me this 15th day of December, 1888, *ss:*
[L. S.] GEO. W. KUHLKE,
Notary Public, Kings County.

C. F. N. Y. Co.

16 (Endorsed:) U. S. circuit court, so. dist. of New York. Friedrich Hohorst, plaintiff, against the Hamburg-American Packet Company *et al.*, defendants. Demurrer of the Hamburg-American Packet Company. Walter D. Edmonds, sol'r for def't: office and post-office address, Temple court, 5 & 7 Beekman St., New York city; rooms 157–159. U. S. circuit court. Filed Dec. 18, 1888. John A. Shields, clerk.

17 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
HAMBURG-AMERICAN PACKET COMPANY *et al.*, Defendants. } In Equity.

You will please take notice that on the annexed affidavit and the pleadings in this suit we will move this court, at a term thereof to be held at its court-room, in the United States court and post-office building, in the city of New York, on Friday, the 28th day of December, 1888, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order allowing the complainant to file an amended bill in this suit, amending the bill now on file as follows:

Insert the word "jointly" after the word "have," in the third line of the second printed page.

At the end of the second printed page insert the following allegations:

"Your orator further states that all of the defendants above named are inhabitants of the city and county of New York; that the defendant The Hamburg-American Packet Company has its principal business office in this country located in the city and county of New
18 York; that the defendants Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens, and William Koester are and during the time of the infringement above set forth were copartners under the firm name of Kunhardt and Company, and as such copartners are and were the agents and managers of the business of the Hamburg-American Packet Company in this country, and have their principal business office as such located in the city and county of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have co-operated and participated in all the said acts and infringements."

And for such other and further relief as may seem just.

Dated December 24th, 1888.

Yours, &c., LOGAN & CLARK,
Complainant's Solicitors.

To W. D. Edmonds, Esq., defendants' solicitor.

19 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
HAMBURG-AMERICAN PACKET COMPANY *et al.*, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } *ss:*

Salter S. Clark, being duly sworn, states that he is one of the solicitors for the complainant in this suit; that the bill of complaint herein was filed on the 15th day of September, 1888; that on the 5th day of November all the defendants appeared in the suit; that after certain extensions of time separate demurrers were filed by each of the defendants to the bill of complaint, specifying the grounds of demurrer to be as to each of the defendants that the bill of complaint was multifarious, and also the additional ground, with regard to the defendants The Hamburg-American Packet Company, Arend Behrens, and William Koester, that the court had no jurisdiction of such defendants.

That deponent intended to draw the bill of complaint so that it should clearly set forth that the infringements referred to
20 therein were committed by the defendants jointly, and that the defendants were also inhabitants, under the meaning of the statute, of the city and county of New York; that he did not suppose until the serving of these demurrers that the bill was open to any other construction; he still believes and maintains that the bill is sufficient, but desires to make the amendment so as to settle all possible question.

That the allegations desired to be inserted in the bill of complaint are true, as he is informed and believes.

SALTER S. CLARK.

Sworn to before me this 24th day of December, 1888.

F. ESTELLE BRIGGS,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

21 At a term of the United States circuit court for the southern district of New York, held at the United States court and post-office building, in the city of New York, on the 11th day of January, 1889.

Present: Hon. E. Henry Lacombe, circuit judge.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. KUNHARDT, Sr., HENRY R. KUNHARDT, Jr., GEORGE H. DIEHL, AREND BEHRENS, and WILLIAM KOESTER, Defendants. } In Equity.

Motion having been made on the behalf of the complainant to amend his bill of complaint herein—

Now, upon reading and filing the complainant's notice of motion herein, dated December 24th, 1888; the affidavit of Salter S. Clark, verified December 24th, 1888; the pleadings and affidavit of Arend Behrens, verified January 8th, 1889, and after hearing Salter S. Clark, on behalf of the complainant, in support of said motion, and Walter D. Edmonds, Esq., on behalf of the defendants, in opposition thereto:

Now, on motion of Logan & Clark, complainant's solicitors, it is—

Ordered that the complainant's said motion for leave to amend his bill of complaint *nunc pro tunc* be, and the same is hereby, granted.

And the complainant is hereby granted leave, within five days from the entry of this order, to file, *nunc pro tunc* as of the date of the filing of the original bill of complaint, an amended bill of complaint herein, to the purport and effect as prayed in his said notice of motion, and that the defendants in the suit have leave to answer, demur, or plead to said bill as amended on or before the first Monday of March, 1889.

E. HENRY LACOMBE, *Judge.*

22 (Endorsed:) Circuit court of the United States, southern district of New York. Friedrich Hohorst, complainant, against Hamburg-American Packet Company *et al.*, defendants. Order. Logan & Clark, complainant's solicitors, No. 54 William street, New York city. U. S. circuit court. Filed Jan. 31, 1889. John A. Shields, clerk.

23 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. KUNHARDT, Sr., HENRY R. KUNHARDT, Jr., GEORGE H. DIEHL, AREND BEHRENS, and WILLIAM KOESTER, Defendants. } In Equity.

To the honorables the judges of the circuit court of the United States for the southern district of New York:

Friedrich Hohorst, of New York city, New York, and a citizen of the State of New York, brings this his amended bill of complaint against The Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover,

Empire of Germany, and doing business in the city of New York; Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, citizens of the United States and residents of the State of New York, and Arend Behrens and William Koester, citizens of the United States and residents of the State of New Jersey.

And thereupon your orator complains and says that heretofore and before the date of the application for letters patent, as hereinafter mentioned, your orator, a citizen of the United States and then of New York city, in the State of New York, was the original and first inventor of a new and useful improvement in slings for packages, not known or used by others, and not patented or described in any printed publication before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application for letters patent therefor.

And your orator further shows unto your honors that he, being so aforesaid the first and original inventor of said improvement, did, before the 10th day of October, 1871, apply in due form to the Commissioner of Patents of the United States for letters patent of the United States therefor.

And your orator further shows unto your honors that, he having as aforesaid applied for letters patent of the United States for said improvement and having fully and in all respects complied with all the requirements of the law in that behalf, letters patent for said improvement were duly issued to your orator by the United
24 States, under the seal of the Patent Office, signed by the acting Secretary of the Interior and countersigned by the acting Commissioner of Patents, bearing date the 10th day of October, 1871, and numbered 119,765—

Whereby was granted and secured to your orator and his heirs and assigns for the term of seventeen years from the date thereof, the full and exclusive right and liberty of making, using, and vending to others to be used throughout the United States and the territories thereof the said improvement in slings for packages, as by reference to said letters patent for said improvement, in court to be produced, will more fully and at large appear.

And your orator further shows that he is the sole and exclusive owner of said invention and the letters patent therefor and is in full enjoyment of all the rights and privileges granted and secured or intended to be granted or secured thereby, and that said rights and privileges have been and are of great value to your orator.

And your orator further shows unto your honors that the defendants, well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator and to deprive him of the benefits and advantages which might and otherwise would accru- to him from said invention, and without the license or allowance and against the will of your orator and in violation of your orator's rights, have jointly made and used and allowed others to use, at divers times continuously during several years last past, at the city, county, and State of New York and elsewhere, slings for packages embracing and containing said patented invvention and improvement, all in violation of the rights secured to your

orator as aforesaid and to his irreparable loss and injury, by which he has been and still is being deprived of great gains and profits which he might and otherwise would have obtained, but which have been received and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings.

And your orator further shows unto your honors that the said defendants have derived and received and are still deriving and receiving from the aforesaid wrongful use of said invention large gains and profits, but what amount of such gains and profits have been so derived and received by said defendants your orator does not know and cannot set forth, but prays that said defendants may be required to make a discovery as to their use of said invention and of all gains and profits received by them therefrom or by means thereof.

And your orator further shows unto your honors that the said defendants have been warned and requested to desist and refrain from said infringement and said unlawful and wrongful acts, but that said warning and request and notice have been wholly disregarded by them, and that said defendants still continue the infrigement and unlawful and wrongful acts as aforesaid.

25 And your orator further shows unto your honors that on or about the 1st day of February, 1887, the complainant filed his bill of complaint in equity against the Inman and International Navigation Steamship Company (Limited) in the United States circuit court for the second *district* and the southern district of New York, setting forth, among other things, the said letters patent No. 119,765, of the 10th day of October, 1871, and the infringement of the aforesaid letters patent by said defendants therein, and praying an injunction and account against them, and the said defendants therein filed their answer to the said bill of complaint, denying, among other things, the validity of the said letters patent, and, issue being joined therein, the parties proceeded to take proofs, which were taken at length.

And your orator further shows unto your honors that, the proofs in said cause being taken, the cause was brought to a final hearing on its merits in the month of April, 1888, before his honor Mr. Justice William J. Wallace, and was argued before him by the counsel for the respective parties, and that he, having duly considered the matter, rendered judgment thereupon in favor of the complainant, the decree being entered on the 6th day of April, 1888.

And that the said court decided, among other things, that the said letters patent were valid in law; that the said complainant was the original and first inventor of the improvements patented as aforesaid and referred to in said bill of complaint, and perpetually enjoined the defendants therein from making, constructing, using, and vending to others to be used the said improvements patented as aforesaid, and ordered an account to be taken of the damages suffered by the complainant by reason of the infringement by the said defendants and of the profits that had accrued to the said defendants therein from their infringement, as by reference to the rec-

ord of the proceedings in said suit will more fully and at large appear.

Your orator further states that all of the defendants above named are inhabitants of the city and county of New York; that the defendant The Hmaburg-American Packet Company has its principal business office in this country, located in the city and county of New York; that the defendants Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrends, and William Koester are and during the time of the infringements above set forth were copartners under the firm name of Kunhardt & Company, and as such copartners are and were the agents and managers of the business of the Hamburg-American Packet Company in this country and have their principal business office as such located in the city and county of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have co-operated and participated in all the said acts and infringements.

In consideration whereof, and forasmuch as your orator can
26 have no adequate relief except in this honorable court, to the end, therefore, that the said defendants herein may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their oath, according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as if separately interrogated as to each and every of said matters, and that they may be required to make discovery and disclosure of all gains and profits derived and received from such unlawful and wrongful manufacture, construction, use, or sale, and that they be decreed to account for and with and to pay over to your orator the profits by them acquired and the damages suffered by your orator from the aforesaid unlawful and wrongful acts—

And may it please your honors, the premises considered, to grant unto your orator the writ of injunction issuing out of and under the seal of this honorable court, permanently enjoining and restraining the said defendants, their agents, servants, workmen, employees, and attorneys, and each and every of them from directly or indirectly making, using, or selling or offering for sale any slings for packages containing or embodying said invention granted by said letters patent as aforesaid and from infringing upon or violating the said letters patent by the making, us-, or sale of said slings for packages or said invention or improvements in any way whatsoever.

And may it please your honors, the premises considered, to grant unto your orator the writ of subpœna issued out of and under the seal of this honorable court, to be directed to the above-named defendants, thereby commanding them, at a certain day and under a certain penalty therein to be limited, personally to be and appear before your honors in this honorable court and then and there full, true, and perfect answers make to all and singular the premises, and, further, to stand to, perform, and abide such further order, direction, and decree therein as your honors shall deem meet.

May it please your honors to grant to your orator a provisional or preliminary injunction issuing out of and under the seal of this honorable court, enjoining and restraining the defendants, their attorneys, solicitors, clerks, servants, workmen, and agents, to the same purport, tenor, and effect hereinbefore prayed for in regard to the said permanent injunction.

And your orator will ever pray, &c.

FR. HOHORST.

SALTER S. CLARK,
LOGAN & CLARK,
Complainant's Solicitors and of Counsel.

UNITED STATES OF AMERICA,
Eastern District of New York, } ss:

27 Friedrich Hohorst, being duly sworn, deposes and says that he is the complainant in the foregoing bill of complaint named and has read the same and knows the contents thereof; that the said bill of complaint is true, of his own knowledge, except as to the matters which are therein alleged to be stated on information and belief, and as to those matters he believes it to be true.

[L. S.] F. HOHORST.

Sworn to before me this first day of February, 1889.

J. D. H. BERGEN,
Notary Public, Kings Co. [SEAL.]

(Endorsed:) United States circuit court, southern district of New York. Frederick Hohorst, complainant, ag't Hamburg-American Packet Company *et al.*, defendants. Amended bill of complaint. Logan & Clark, complainant's solicitors, 54 Williams street, New York city. U. S. circuit court. Filed Feb'y 2d, 1889. John A. Shields, clerk.

28 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST
vs.
HAMBURG-AMERICAN PACKET COMPANY *et al.* } In Equity.

Please take notice that on the 1st day of March, 1889, on the call of the regular motion calendar of the above-named court, at eleven o'clcok in the forenoon of that day, or as soon thereafter as counsel can be heard, motion will be made to the above-named court, in the court-rooms thereof, in the U. S. post office building, in the city of New York, for an order directing that the notice of appearance entered in the above-entitled cause on behalf of the defendant The Hamburg-American Packet Company be amended *nunc pro tunc* by inserting in said notice the following words, to wit:

"And you will please take notice that the said appearance of the defendant The Hamburg-American Packet Company herein is not made generally, but specifically and for the specific and only pur-

pose of moving to set aside the alleged service of the *subpœna ad respondendum* upon it through its alleged agent, Henry R. Kunhardt, Sr., and to dismiss the bill of complaint herein as against it because of lack of jurisdiction and for the purpose of procuring the dismissal of said bill as against it for lack of jurisdiction by motion, demurrer, or plea, as it shall be advised."

And that at the same time and place motion will also be made to said court for an order directing that the service of the *subpœna ad respondendum* herein made upon said defendant, The Hamburg-American Packet Company, be set aside and the bill of complaint herein dismissed as against said Hamburg-American Packet Company because of lack of jurisdiction of this court over the person of said defendant, The Hamburg-American Packet Company, and for such other and further relief as to the court may seem meet.

Said motion will be based upon the affidavits, copies of which are hereto annexed, and upon the affidavit of Arend Behrens, hereinbefore filed, and upon all the papers, pleadings, and proceedings had in the above-entitled cause.

Dated New York, February 21st, 1889.

Yours, etc., WALTER D. EDMONDS,
Solicitor for Def'ts, No. 5 Beekman St., N. Y. City.

To Logan & Clark, solicitors for com'l't, No. 54 William St., N. Y. city.

29 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST
ag'st
HAMBURG-AMERICAN PACKET COMPANY *et al.* } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, } *ss:*

Richard John Cortis, being duly sworn, says:

I reside in the town of Flatbush, Long island, in the State of New York.

For several years last past I have been well acquainted with all the details of the organization and residence and general business of the defendant The Hamburg-American Packet Company, and I have had and have now important business relations therewith.

Said company is not incorporated under the laws of any one of the United States nor of the United States.

It was incorporated and ever since its incorporation has done business under and pursuant to the laws of a European government.

The principal offices and place of business of said company were at the time of the commencement of the above-entitled cause and always had been prior thereto situated in the city of Hamburg, in Germany, and the residences of all the directors and stockholders of said corporation were within the territorial limits of the Empire of Germany.

Up to the time of the commencement of this cause said company

had never had an office in the city of New York or at any place within the southern district of New York. Said company has never, therefore, had any residence, as I understand the meaning of the term, within the southern district of New York, nor has it ever been an inhabitant of said district.

R. J. CORTIS.

Sworn to before me this 21st day of February, 1889.

ANTONIO GONZALEZ, [SEAL.]
Notary Public, N. Y. Co.

30 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST
ag'st
HAMBURG-AMERICAN PACKET COMPANY, HENRY R. KUNHARDT, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens, and William Koester.

U. S. AMERICA.

SOUTHERN DISTRICT OF NEW YORK, } *ss:*
City and County of New York, }

Walter D. Edmonds, being duly sworn, says:

I am the solicitor for the defendants in the above-entitled cause.

Said cause was commenced by service of two *subpœnas ad respondendum* upon Henry R. Kunhardt, Sr., one of which services the marshall has returned as made on the defendant The Hamburg-American Packet Company, the other as made on said Henry R. Kunhardt, Sr., individually.

Immediately after my retainer by the defendants I carefully examined the bill of complaint herein then on file and on which said subpœnas had been issued.

Said bill of complaint alleged that said company defendant "is organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and doing business in the city of New York;" no other allegation was made in said bill of complaint respecting said company specifically.

Said bill of complaint further failed to contain any allegation that the defendants had jointly infringed or were in any way whatever connected with each other.

Said bill also alleged that the defendants Arend Behrens and William Koester were residents of the State of New Jersey.

A copy of said bill of complaint is hereto annexed and marked Schedule A.

Because the bill alleged and failed to allege as I have here stated I formed the opinion that this court, on the face of the bill, had, by the service of the process hereinbefore described, acquired no jurisdiction as against the defendant company nor as against the defendants Behrens and Koester, and I formed the further

opinion that a motion to set aside the services of the process
31 and to dismiss the bill as against said three last-mentioned defendants could be made on their behalf, and I also formed the opinion that said bill was demurrable on behalf of each of the defendants by reason of multifariousness, no joint infringement or joint relationship being alleged, and I formed the further opinion that said bill of complaint was also demurrable by the three defendants, said company, said Behrens, and said Koester, on the ground of non-jurisdiction.

The question next arose as to the best and cheapest method of bringing these defences before this court. Two courses were open, one to file special appearance on behalf of said company, said Behrnes and said Koester, prepare affidavits and make motion to set aside the service of the process and dismiss the bill against the said three defendants, and to file demurrer on behalf of the three defendants, Kunhardt, Sr., Kunhardt, Jr., and Diehl.

This would have involved the preparation of two sets of papers and the making of two separate arguments at different times; besides my clients informed me that no allegations of joint infringement could be truthfully made against them, so far as joint infringement by the said company and the other defendants was concerned, and all desired that advantage should be taken of this defence on behalf of each.

In order, therefore, to combine all these defences and to give each defendant the advantage of all of them on the same set of papers and in one argument before the court, thus generally diminishing expenses of litigation, I determined, relying upon the character of the bill of complaint and its specific allegations and omissions, that the other and best course to pursue was for each defendant to file separate demurrer; all of which could be heard together.

A demurrer was accordingly filed by me on behalf of each of the defendants herein. A copy of the demurrer so filed on behalf of the defendant company is hereto annexed and marked Schedule B.

No sooner had said demurrers been filed and served than complainant made motion to amend his bill of complaint therein by inserting therein the word "jointly" before the word "infringed," and by also inserting therein an allegation that "all of the defendants above named are inhabitants of the city and county of New York, and that the defendants other than said company are copartners," etc. A copy of said notice of motion and the affidavit on which same was based is hereto annexed and marked Schedule C.

This motion was made on the ground that the complainant's solicitor, Mr. Clark, supposed that he was pleading these allegations when he first drafted his bill, and that "he still believes and maintains that the bill is sufficient, but desires to make the amendment, so as to settle all possible question.

Said motion to amend was granted in spite of the defendant's opposition, and bill of complaint amended accordingly has now been filed in this cause.

32 This amended bill of complaint contains what, I am informed and believe, is an entirely false statement, to wit, that said defendant company is "an inhabitant of the city and county of New York."

By the insertion of this allegation the complainant has been allowed to practically defeat the defendant company's valid demurrer filed to the original bill of complaint.

Had the original bill of complaint contained this allegation, to wit, that the defendant company was an inhabitant of the city and county of New York, I should most certainly have filed a special appearance on behalf of said company for the purpose of moving to set aside the service of the process and to dismiss the bill of complaint instead of demurring as aforesaid.

As matters now stand the general appearance of the defendant company, which was made only for the specific purpose of filing demurrer, which would have been conclusive on the question of jurisdiction, will nevertheless be insisted upon by the complainant as a general appearance to the bill of complaint.

The defendant company's said appearance was never intended as a general appearance to any such bill as that with which, to its surprise, it is now confronted.

I ask therefore, on behalf of the defendant company, that inasmuch as complainant has received the indulgence of the court enabling him to amend his bill, and thus frustrate a valid demurrer to jurisdiction, that a like degree of indulgence be extended also to the defendant company, and that this court will make an order permitting the notice of appearance herein filed on behalf of the defendants to be so amended *nunc pro tunc* as to render said appearance, so far as said company is concerned, a special appearance made only for the purpose of moving to set aside said service of process, and to dismiss the said bill of complaint as against it on the ground of non-jurisdiction, under chapter 373 of the Statutes at Large of the United States, passed March 3, 1887.

WALTER D. EDMONDS.

Sworn to before me this 21st day of February, 1889.

[SEAL.] JAMES J. KENNEDY,
Notary Public, Kings Co.

Cert. filed in New York Co.

33 SCHEDULE A.

United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. KUNHARDT, Sr., HENRY R. KUNHARDT, Jr., GEORGE H. DIEHL, AREND BEHRENS, and WILLIAM KOESTER, Defendants. } In Equity.

To the honorables the judges of the circuit court of the United States for the southern district of New York:

Friedrich Hohorst, of New York city, New York, and a citizen of the State of New York, brings this his bill of complaint against the Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and doing business in the city of New York; Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, citizens of the United States and residents of the State of New York, and Arend Behrens and William Koester, citizens of the United States and residents of the State of New Jersey.

And thereupon your orator complains and says that heretofore and before the date of the application for letters patent as hereinafter mentioned your orator, a citizen of the United States and then of New York city, in the State of New York, was the original and first inventor of a new and useful improvement in slings for packages not known or used by others and not patented or described in any printed publication before his invention or discovery thereof and not in public use or on sale for more than two years prior to his application for letters patent therefor.

And your orator further shows unto your honors that he, being so as aforesaid the first and original inventor of said improvement, did, before the 10th day of October, 1871, apply in due form to the Commissioner of Patents of the United States for letters patent of the United States therefor.

34 And your orator further shows unto your honors that, he having as aforesaid applied for letters patent of the United States for said improvement, and having fully and in all respects complied with all the requirements of the law in that behalf, letters patent for said improvement were duly issued to your orator by the United States under the seal of the Patent Office, signed by the acting Secretary of the Interior and countersigned by the acting Commissioner of Patents, bearing date the 10th day of October, 1871, and numbered 119,765—

Whereby was granted and secured to your orator and his heirs and assigns for the term of seventeen years from the date thereof the full and exclusive right and liberty of making, using, and vending to others to be used throughout the United States and the territories thereof the said improvement in slings for packages, as

by reference to said letters patent for said improvement, in court to be produced, will more fully and at large appear.

And your orator further shows that he is the sole and exclusive owner of said invention and the letters patent therefor, and is in full enjoyment of all the rights and privileges granted and secured or intended to be granted or secured thereby, and that said rights and privileges have been and are of great value to your orator.

And your orator further shows unto your honors that the defendants, well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator and to deprive him of the benefits and advantages which might and otherwise would accrue to him from said invention, and without the license or allowance and against the will of your orator and in violation of your orator's rights, have made and used and allowed others to use, at divers times continuously during several years last past, at the city, county, and State of New York and elsewhere, slings for packages embracing and containing said patented invention and improvement, all in violation of the rights secured to your orator as aforesaid and to his irreparable loss and injury, by which he has been and still is being deprived of great gains and profits which he might and otherwise would have obtained, but which have been received and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings.

And your orator further shows unto your honors that the said defendants have derived and received and are still deriving and receiving from the aforesaid wrongful use of said invention large gains and profits, but what amount of such gains and profits have been so derived and received by said defendants your orator does not know and cannot set forth, but prays that said defendants may be required to make a discovery as to their use of said invention and of all gains and profits received by them therefrom or by means thereof.

35 And your orator further shows unto your honors that the said defendants have been warned and requested to desist and refrain from said infringement and said unlawful and wrongful acts, but that said warning and request and notice have been wholly disregarded by them, and that said defendants still continue the infringement and unlawful and wrongful acts as aforesaid.

And your orator further shows unto your honors that on or about the 1st day of February, 1887, the complainant filed his bill of complaint in equity against the Inman and International Steamship Company (Limited), in the United States circuit court for the second circuit and the southern district of New York, setting forth, among other things, the said letters patent No. 119,765 of the 10th day of October, 1871, and the infringement of the aforesaid letters patent by said defendants therein, and praying an injunction and account against them; and the said defendants therein filed their answer to the said bill of complaint, denying, among other things, the validity of the said letters patent, and, issue being joined therein, the parties proceeded to take proofs, which were taken at length.

And your orator further shows unto your honors that, the proofs

in said cause being taken, the cause was brought to a final hearing on its merits in the month of April, 1888, before his honor Mr. Justice William J. Wallace, and was argued before him by the counsel for the respective parties, and that he, having duly considered the matter, rendered judgment thereupon in favor of the complainant, the decree being entered on the 6th day of April, 1888.

And that the said court decided, among other things, that the said letters patent were valid in law; that the said complainant was the original and first inventor of the improvement patented as aforesaid and referred to in said bill of complaint, and perpetually enjoined the defendants therein from making, constructing, using, and vending to others to be used the said improvement patented as aforesaid, and ordered an account to be taken of the damages suffered by the complainant by reason of the infringement by the said defendants and of the profits that had accrued to the said defendants therein from their infringement, as by reference to the record of *of* the proceedings in said suit will more fully and at large appear.

In consideration whereof and forasmuch as your orator can have no adequate relief except in this honorable court, to the end, therefore, that the said defendants herein may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their oath and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and par-
36 ticularly as if separately interrogated as to each and every of said matters, and that they may be required to make discovery and disclosure of all gains and profits derived and received from such unlawful and wrongful manufacture, construction, use, or sale, and that they be decreed to account for and with and to pay over to your orator the profits by them acquired and the damages suffered by your orator from the aforesaid unlawful and wrongful acts—

And may it please your honors, the premises considered, to grant unto your orator the writ of injunction, issuing out of and under the seal of this honorable court, permanently enjoining and restraining the said defen-ants, their agents, servants, workmen, employees, and attorneys, and each and every of them, from directly or indirectly making, using, selling, or offering for sale any slings for packages containing or embodying said invention granted by said letters patent as aforesaid and from infringing upon or violating the said letters patent by the making, use, or sale of said slings for packages or said invention or improvement in any way whatsoever.

And may it please your honors, the premises considered, to grant unto your orator the writ of subpœna issued out of and under the seal of this honorable court, to be directed to the above-named defendants, thereby commanding them at a certain day and under a certain penalty therein to be limited personally to be and appear before

your honors in this honorable court and then and there full, true, and perfect answers make to all and singular the premises, and, further, to stand to, perform, and abide such further order, direction, and decree therein as your honors shall deem meet.

May it please your honors to grant to your orator a provisional or preliminary injunction issuing out of and under the seal of this honorable court enjoining and restraining the defendants, their attorneys, solicitors, clerks, servants, workmen, and agents, to the same purport, tenor, and effect hereinbefore prayed for in regard to the said permanent injunction.

And your orator will ever pray, &c.

FR. HOHORST.

SALTER S. CLARK,
LOGAN & CLARK,
Complainant's Solicitors and of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Freidrich Hohorst, being duly sworn, deposes and says that he is the complainant in the foregoing bill of complaint named and has read the same and knows the contents thereof; that the said bill of complaint is true of his own knowledge except as to the matters which are therein alleged to be stated on information and belief, and as to those matters he believes it to be true.

F. HOHORST.

Sworn to before me this 14th day of September, 1888.
THOMAS W. SMITH,
Notary Public, N. Y. Co.

37 SCHEDULE B.

United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. KUNHARDT, Sr., HENRY R. KUNHARDT, Jr., GEORGE H. DIEHL, AREND BEHRENS, and WILLIAM KOESTER, Defendants. } In Equity.

The demurrer of The Hamburg-American Packet Company, one of the defendants above named, to the bill of complaint of Friedrich Hohorst, the above-named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill of complaint, and for cause of demurrer showeth that—

First. It appears by the said bill that the same is exhibited as

against the defendant and the said several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that it does not appear by said bill that said defendants or any of them or their alleged infringements therein complained of are in any way connected, and that the said bill is altogether multifarious.

And for a further cause of demurrer showeth that—

Second. The said complainant hath not in and by his said bill made or stated such a case as entitled him in this court of equity to any discovery from this defendant or to any relief against it as to the matters contained in the said bill or any such matters, in that it appears by said bill that the above-named court has no jurisdiction of this defendant for the purpose of entertaining and conducting the above-mentioned cause against it.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur thereto and to all the matters and things therein contained, and humbly demands the judgment of this court whether it shall be com-
38 pelled to make any further or other answer to the said bill of complaint, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

HAMBURG-AMERICAN PACKET CO.,
By KUNHARDT & CO., *Agents.*

Walter D. Edmonds, solicitor and of counsel for defendant; office and post-office address, No. 5 Beekman St., New York city.

I certify that, in my opinion, the foregoing demurrer of the Hamburg-American Packet Company to the bill of complaint of Frederich Hohorst in the above-entitled cause is well founded in point of law and proper to be filed in the above cause.

WALTER D. EDMONDS,
Of Counsel for Defendant.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Arend Behrens, being duly sworn, says that he is an agent of the Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and that said company is a resident and citizen of said kingdom and is one of the defendants named in the above-entitled cause; that he has read said demurrer and knows the contents thereof, and that said demurrer is not interposed for delay, and that deponent is duly authorized to make this affidavit on behalf of said defendant company.

AREND BEHRENS.

Sworn to before me this 15 day of December, 1888.

GEO. W. KUHLKE,
Notary Public, Kings County.

[SEAL.]

C. F. N. Y. Co.

39 SCHEDULE C.

United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
HAMBURG-AMERICAN PACKET COMPANY *et al.*, Defendants. } In Equity.

You will please take notice that on the annexed affidavit and the pleadings in this suit we will move this court, at a term thereof to be held at its court-room, in the United States court and post-office building, in the city of New York, on Friday, the 28th day of December, 1888, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order allowing the complainant to file an amended bill in this suit, amending the bill now on file, as follows:

Insert the word "jointly" after the word "have" in the third line of the second printed page.

At the end of the second printed page insert the following allegation:

"Your orator further states that all of the defendants above named are inhabitants of the city and county of New York; that the defendant The Hamburg-American Packet Company has its principal business office in this country, located in the city and county of New York; that the defendants Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens, and William Koester are and during the time of the infringements above set forth were copartners under the firm name of Kunhardt and Company, and as such copartners are and were the agents and managers of the business of the Hamburg-American Packet Company in this country and have their principal business office as such located in the city and county of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have co-operated and participated in all the said acts and infringements."

And for such other and further relief as may seem just.

Dated December 24th, 1888.

Yours, &c., LOGAN & CLARK,
Complainant's Solicitors.

To W. D. Edmonds, Esq., defendants' solicitor.

40 SCHEDULE C.

United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
HAMBURG-AMERICAN PACKET COMPANY *et al.*, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
City & County of New York, } *ss:*

Salter S. Clark, being duly sworn, states that he is one of the solicitors for the complainant in this suit; that the bill of complaint herein was filed on the 15th day of September, 1888; that on the 5th day of November all the defendants appeared in the suit; that, after certain extensions of time, separate demurrers were filed by each of the defendants to the bill of complaint specifying the grounds of demurrer to be, as to each of the defendants, that the bill of complaint was multifarious, and also the additional ground with regard to the defendants The Hamburg-American Packet Company, Arend Behrens, and William Koester that the court had no jurisdiction of such defendants.

That deponent intended to draw the bill of complaint so that it should clearly set forth that the infringements referred to therein were committed by the defendants jointly, and that the defendants were also inhabitants, under the meaning of the statute, of the city and county of New York; that he did not suppose until the serving of these demurrers that the bill was open to any other construction. He still believes and maintains that the bill is sufficient, but desires to make the amendment so as to settle all possible questions.

That the allegations desired to be inserted in the bill of complaint are true, as he is informed and believes.

SALTER S. CLARK.

Sworn to before me this 24th day of December, 1888.
F. ESTELLE BRIGGS,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

41 U. S. Circuit Court, Southern District of New York.

FRIEDRICH HOHORST
vs.
HAMBURG-AMERICAN PACKET COMPANY *et al.* } In Equity.

U. S. OF AMERICA,
Southern District of New York,
City and County of New York, } *ss:*

Arend Behrens, being duly sworn, says: I am one of the defendants above named; I have read the bill of complaint herein and

also the affidavit of Salter S. Clark, verified December 24, 1888, and the notice of motion for order amending said bill of complaint annexed to said affidavit and dated December 24, 1888.

I do not regard it as true that the Hamburg-American Packet Company has its principal business office in this country, located at the city and county of New York. The actual facts are that the said company has its docks, where all its steamers land and take and discharge cargo, situated in the State of New Jersey. There also is the office of the company for the transaction of the matters immediately connected with all its actual industrial operations in this country.

Said company advertises that it has an office in the city of New York, which is the office of the firm of Kunhardt and Co., is rented by Kunhardt & Co., and entirely under their control. It is in fact the office of Kunhardt and Co., agents for the Hamburg-American Packet Company, and in said office of Kunhardt & Co., and by Kunhardt & Co., as agents, the usual monetary and financial transactions of said Hamburg-American Packet Company are conducted. All the actual physical business of said Hamburg-American Packet Company within the United States, however, is conducted within the State of New Jersey as aforesaid.

It is not true that Kunhardt & Co. have, jointly with said Hamburg-American Packet Company, infringed the letters patent set forth in the bill of complaint. All operations of loading and unloading the cargo from the said Hamburg-American Packet Company's vessels in this country are performed in New Jersey as aforesaid, under the immediate direction and control of a superintendent especially employed and appointed by the Hamburg-American Packet Company for that purpoe and whose salary or compensation is paid by said company, and with the direction and details of whose supervision of said loading and unloading the firm of Kunhardt & Co. have no concern and exercise no control.

Therefore, so far as the defendants constituting the firm of Kunhardt & Co. are concerned, they have never, jointly with the
42 Hamburg-American Packet Company, made use of slings for packages either infringing said letters patent or of any other nature, sort, or kind, nor have such slings ever been used under the joint direction of said firm of Kunhardt & Co. and said Hamburg-American Packet Company.

It is not true that the defendants Arend Behrens and William Koester are or were inhabitants of the city, county, and State of New York, as alleged in said notice and affidavit of Mr. Clark. As originally sworn to in the bill of complaint herein, the defendants Arend Behrens and William Koester are and were at the time of and for several years prior to the filing of the bill of complaint herein both residents of the State of New Jersey.

It is not true that the defendant Henry R. Kunhardt, Sr., is an inhabitant of the city and county of New York. The fact is that he resides and for several years prior to the filing of the bill of complaint herein has resided in New Brighton, Richmond county, New York.

And deponent denies that the said infringements referred to in said affidavit, notice, and bill of complaint "were committed in the prosecution of the business" of the said copartnership of Kunhardt & Co. or in the prosecution of their said business as agents of said Hamburg-American Packet Company, and denies "that all the defendants have co-operated and participated in all the said acts and infringements."

None of the defendants, as deponent is informed and believes, were ever served with any process herein except the defendant Henry R. Kunhardt, Sr.

AREND BEHRENS.

Sworn to before me this 8th day of January, 1889.
[SEAL.] THOMSON H. PALMER,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Endorsed: U. S. circuit court, so. dist. of N. Y. Friedrich Hohorst ag't Hamburg-American Packet Co. *et al.* Notice of motion. Aff'd'ts of R. J. Cortis & W. D. Edmonds. U. S. circuit court. Filed Ap'l 1st, 1889. John A. Shields, clerk.

43 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
vs.
THE HAMBURG-AMERICAN PACKET COMPANY *et al.*, Defendants. } In Equity.

UNITED STATES OF AMERICA,
Southern District of New York, City & County of New York, } *ss*:

Salter S. Clark, being duly sworn, states that he is one of the solicitors for the complainant in this suit; that the proceedings in this suit have been as follows:

September 5th, 1888, original bill filed and subpœnas issued, which were served, one copy upon Henry R. Kunhardt, Sr., personally, and a second copy upon Henry R. Kunhardt, Sr., as agent for the Hamburg-American Packet Company.

November 5th, 1888, all the six defendants, including the Hamburg-American Packet Company, appeared voluntarily and generally by a notice of appearance, a copy of which is hereto annexed.

November 27th, 1888, I extended the defendants' time to answer or plead to December 20th.

44 December 18th, 1888, separate demurrers filed by each defendant.

December 24th, 1888, I served a notice of motion to amend the bill so that it should more clearly appear that we alleged the infringement to be joint.

January 7th, 1889, I received notice of motion, returnable the same day as my above motion, to dismiss the bill.

January 28th, 1889, my motion to amend granted and defendants' motion to dismiss denied.

February 2nd, 1889, amended bill of complaint filed.

February 16th, 1889, notice of hearing served by the defendant The Hamburg-American Packet Company upon (as stated in said notice of argument) "the bill of complaint, demurrer, pleadings, and other proceedings."

February 23rd, 1889, I received this notice of motion that the defendant be allowed to change his general appearance into a special appearance for the purpose of making a motion to dismiss the cause.

SALTER S. CLARK.

Sworn to before me this 14th day of March, 1889.

RIGNAL DUCHETT WOODWARD,
Notary Public, N. Y. Co.

45 *Copy of Notice of Appearance.*

United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY, HENRY R. KUNHARDT, Sr., HENRY R. KUNHARDT, Jr., GEORGE H. DIEHL, AREND BEHRENS, and WILLIAM KOESTER, Defendants.
} In Equity.

Please take notice that the above-named defendants appear in the above-entitled cause, and that I am retained by and appear as solicitor for them therein.

Dated New York, Nov. 5th, 1888.

Yours, &c., WALTER D. EDMONDS,
Solicitor for Defendants, No. 5 Beekman Street, New York City.

To John A. Shields, Esq., clerk of the above-named court.

(Endorsed:) Filed Nov. 5th, 1888.

(Endorsed:) Circuit court of the United States, southern district of New York. Friedrich Hohorst, complainant, against Hamburg-American Packet Co., defendants. Affidavit to oppose motion. Logan & Clark, complainant's solicitors, No. 54 William street, New York city. U. S. circuit court. Filed Apr. 1, 1889. John A. Shields, clerk.

46

47 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST
vs.
HAMBURG-AMERICAN PACKET COMPANY & O'rs.

Motion to amend notice of appearance by limiting the same to a special appearance to set aside service of process and to dismiss.

For the motion W. D. Edmonds, Esq., cited—
Connor *vs.* Vicksburg R. R. Co., 36 Fed. Rep., 273.
Vannerson *v.* Leverett, 31 Fed. Rep., 376.
Jessup *v.* Ill. C. R. R., 36 Fed. Rep., 735.
Halstead *v.* Manning, 34 Fed. Rep., 565.
M'f'g Co. *v.* M'f'g Co., 34 Fed. Rep., 818.
Rheinstadler *v.* Reeves, 33 Fed. Rep., 308.
Preston *v.* Fire Extinguisher Co., 36 Fed. Rep., 721.
Gormley & J. M'f'g Co. *v.* Pope Co., 34 Fed. Rep., 818.
Holmes *v.* R. R. Co., 9 Fed. Rep., 229.
Denton *v.* Int. Co. of Mex., 36 Fed. Rep., 1.
U. S. *v.* Yates, 6 How. U. S., 605.
Hunt *v.* Brennan, 1 Hun., 213.
Becker *v.* Lamont, 13 Hun., 23.
Sullivan *v.* Frazee, 4 Rob., 616.

For the complainant Salter S. Clark, Esq., cited—
48 Creighton *v.* Kerr, 87 U. S., 8.
Norris *v.* Atlas S. S. Co., 37 Fed. Rep., —.

LACOMBE, *Circuit Judge:*

That the court has power to allow a general notice of appearance to be amended so as to make it special only seems to be well settled. U. S. *v.* Yates, 6 How. U. S., 605. The defendant prays for this relief solely, as it insists, because since filing the notice of appearance the complaint has been amended so that it can no longer be demurred to for want of jurisdiction. The motion will be granted unless within 5 days after entry and service of this order the complainant shall stipulate to withdraw his amended complaint and go to trial on the original bill.

The defendant, The Hamburg-American Packet Co., further moves to set aside the service of process upon it because this court has no jurisdiction of the person of such defendant. The suit is brought by a citizen and resident of the State of New York to restrain infringement of a patent and for damages. As such it is covered by the clause of § 1 of the act of March 3, 1887, which provides that no civil suit shall be brought against any person by any original process or proceeding in any other district than that whereof he is an inhabitant. The Hamburg-American Packet Company is incorporated under the laws of a European government. Its principal offices and place of business are and always have been situated in the city of Hamburg, Germany, all its directors and stock-
49 holders being residents of the German Empire. The busi-

ness of the said company is that of an ocean carrier between foreign ports and the port of New York. Its financial agents in this country are Kunhardt & Co., and it advertises their office as its office in New York. By Kunhardt and Company as its agents here its usual monetary and financial transactions are conducted, but the piers to which its vessels come are in New Jersey. There it receives and discharges cargo and maintains an office for the transaction of the matters immediately connected with its actual industrial operations in this country.

Upon this state of facts the defendant, The Hamburg-American Packet Company, cannot be considered an inhabitant of the southern district of New York. If the general appearance be amended as prayed, an order may be entered setting aside the service of process upon that company.

E. HENRY LACOMBE.

(Endorsed:) Circuit court of the United States for the southern district of New York. Friedrich Hohorst *vs.* Hamburg-American Packet Company *et al.* Decision. Lacombe, J. U. S. circuit court. Filed Apr. 1, 1889. John A. Shields, clerk.

50 At a term of the circuit court of the United States for the southern district of New York, held at the court-rooms thereof, in the United States post-office building in the city of New York, on the — day of April, 1889.

Present: Hon. E. Henry Lacombe, circuit judge.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY *et al.*, Defendants.
} In Equity.

Motion having been made in the above cause for an order directing that the notice of appearance therein entered on behalf of the Hamburg-American Packet Company be amended, and that service of subpœna herein made upon said defendant be set aside:

Now, on reading and filing the affidavits of Richard John Cortis and Walter D. Edmonds, both verified the 21st day of February, 1889, and on reference to the affidavit of Arend Behrens, verified the 8th day of January, 1889, and after hearing Walter D. Edmonds, Esq., in support of said motion and Salter S. Clark, Esq., in opposition thereto, it is—

51 Ordered that unless within five days after the entry and service of a copy of this order upon the complainant's solicitor the complainant shall file and serve a stipulation in this cause withdrawing his amended complaint therein as to the defendant The Hamburg-American Packet Company and stipulate to go to trial as to such defendant on the original bill of complaint herein verified the 14th day of September, 1888, the notice of appearance entered in the above-entitled action on behalf of the defendant The Hamburg-American Packet Company be, and the same hereby is, amended as of the date of the filing of said notice of ap-

pearance *nunc pro tunc* by inserting in said notice the following words, to wit:

"And you will please take notice that the said appearance of the defendant The Hamburg-American Packet Company herein is not made generally, but specially and for the specific and only purpose of moving to set aside the alleged service of the *subpœna ad respondendum* upon it through its alleged agent, Henry R. Kunhardt, Sr., and to dismiss the bill of complaint herein as against it because of lack of jurisdiction and for the purpose of procuring the dismissal of said bill as against it for lack of jurisdiction by motion, demurrer, or plea, as it shall be advised."

And it is further ordered that unless the complainant shall file and serve stipulation as hereinabove described that the service of *subpœna ad respondendum* herein upon said defendant, Hamburg-American Packet Company, be set aside and quashed and
52 the bill of complaint herein dismissed as against the said Hamburg-American Packet Company.

E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court, so. dist. of N. Y. Friedrich Hohorst *vs.* The Hamburg-American Packet Co. *et al.* Order. Walter D. Edmonds, sol'r for def'ts; office, Temple court, No. 5 Beekman St., New York city. U. S. circuit court. Filed Apr. 15, 1889. John A. Shields, clerk.

53 U. S. Circuit Court, Southern District of New York.

FRIEDRICH HOHORST
ag'st
THE HAMBURG-AMERICAN PACKET COMPANY *et al.* } In Equity.

On reading and filing the annexed affidavit of William Cotter Dick, Esq., and on motion of Walter D. Edmonds, Esq., it is—

Ordered that the notice of appearance entered in the above-entitled action on behalf of the defendant The Hamburg-American Packet Company be, and the same hereby is, amended as of the date of filing said notice of appearance *nunc pro tunc* by inserting in said notice of appearance the following words, to wit:

"And you will please take notice that the said appearance of the defendants The Hamburg-American Packet Company herein is not made generally, but specially and for the specific and only purpose of moving to set aside the alleged service of the *subpœna ad respondendum* upon it through its alleged agent, Henry R. Kunhardt, Sr., and to dismiss the bill of complaint herein as against it because of lack of jurisdiction and for the purpose of procuring the dismissal of said bill as against it for lack of jurisdiction by motion, demurrer, or plea, as it shall be advised."

And it is further ordered, adjudged, and decreed that the service of the *subpœna ad respondendum* in the above-entitled cause upon the defendant The Hamburg-American Packet Company be, and the same hereby is, set aside and quashed; and it is further ordered, adjudged, and decreed that the bill of complaint herein be, and the

same hereby is, dismissed as against the said The Hamburg-American Packet Company.

Dated N. Y., Apr. 11, 1889.

E. HENRY LACOMBE.

54 U. S. Circuit Court, Southern District of New York.

FRIEDRICH HOHORST
ag'st
THE HAMBURG-AMERICAN PACKET COMPANY *et al.* } In Equity.

U. S. OF AMERICA,
Southern District of New York, City and County of New York, } *ss:*

William Cotter Dick, being duly sworn, says:

I am managing clerk for Walter D. Edmonds, Esq., the solicitor for the defendants in the above-entitled cause.

On the 5th day of April, 1889, there was entered in said cause an order, of which a copy is hereto annexed and marked Schedule A.

On the 5th day of April, 1889, I duly served a copy of said order upon the complainant's solicitors, Logan and Clark, at their office, No. 54 William street, New York city, by delivering to and leaving with Mr. Salter S. Clark, being the Clark of said Logan and Clark, a true copy of said order.

At the time of said service I knew the person so served, as aforesaid, to be one of the firm of the complainant's solicitors, Logan and Clark. I also procured his admission to be endorsed upon another copy of said order which I had with me, being the same copy hereto annexed, marked Schedule A.

Since the service of said order upon the complainant's solicitors as aforesaid the complainant has neglected to file or serve any stipulation in this cause withdrawing his amended complaint therein as to the defendant The Hamburg-American Packet Company or stipulation to go to trial as to said defendant on the original bill of complaint herein, verified the 14th day of September, 1888, as per the terms of said order, and it is now more than five days since service of said order as aforesaid.

WM. COTTER DICK.

Sworn to before me this 11 day of April, 1889.
[SEAL.] DANIEL NASON,
Notary Public, N. Y. Co.

55 SCHEDULE A.

At a term of the circuit court of the United States for the southern district of New York, held at the court-rooms thereof, in the United States post-office building in the city of New York, on the — day of April, 1889.

Present: Hon. E. Henry Lacombe, circuit judge.

FRIEDRICH HOHORST, Complainant,
against
THE HAMBURG-AMERICAN PACKET COMPANY *et al.*, Defendants. } In Equity.

Motion having been made in the above cause for an order directing that the notice of appearance therein entered on behalf of the Hamburg-American Packet Company be amended, and that service of subpœna herein made upon said defendant be set aside:

Now, on reading and filing the affidavit of Richard John Cortis and Walter D. Edmonds, both verified the 21st day of February, 1889, and on reference to the affidavit of Arend Behrens, verified the 8th day of January, 1889, and after hearing Walter D. Edmonds, Esq., in support of said motion and Salter S. Clark, Esq., in opposition thereto, it is—

Ordered that unless within five days after the entry and service of a copy of this order upon the complainant's solicitor the complainant shall file and serve a stipulation in this cause withdrawing his amended complaint herein as to the defendant The Hamburg-American Packet Company and stipulate to go to trial as to such defendant on the original bill of complaint herein, verified the 14th day of September, 1888, *and* the notice of appearance entered in the above-entitled action on behalf of the defendant The Hamburg-American Packet Company be, and the same hereby is, amended as of the date of the filing of said notice of appearance *nunc pro tunc* by inserting in said notice the following words, to wit:

"And you will please take notice that the said appearance of the defendant The Hamburg-American Packet Company herein is not made generally, but specially and for the specific and only purpose of moving to set aside the alleged service of the *subpœna ad respondendum* upon it through its alleged agent, Henry R.
56 Kunhardt, Sr., and to dismiss the bill of complaint herein as against it because of lack of jurisdiction and for the purpose of procuring the dismissal of said bill as against it for lack of jurisdiction by motion, demurrer, or plea, as it shall be advised."

And it is further ordered that unless the complainant shall file and serve stipulation, as hereinabove described, that the service of *subpœna ad respondendum* herein upon said defendant, Hamburg-American Packet Company, be set aside and quashed and the bill of complaint herein dismissed as against the said Hamburg-American Packet Company.

E. HENRY LACOMBE.

57 United States Circuit Court, Southern District of New York.

FRIEDRICH HOHORST, Complainant & Appellant,
against
HAMBURG-AMERICAN PACKET COMPANY, Appellee & Defendant. } In Equity.

To the honorable the Supreme Court of the United States:

The appeal of Frederich Hohorst, the above-named complainant and appellant, respectfully showeth—

That heretofore, and on the 15th day of September, 1888, the above-named complainant and appellant filed his bill of complaint in the circuit court of the United States for the southern district of New York against the above-named defendant and appellee and other parties, alleging in substance the issue to the said complainant of certain letters patent of the United States for an im-
58 provement in slings, the complainant's ownership thereof, and infringement of the said patent by the said defendants jointly.

That on the 5th day of November, 1888, all of the defendants in the said cause named, including the defendant, The Hamburg-American Packet Company, appeared in said cause generally.

That on the 18th day of December, 1888, the said defendant, The Hamburg-American Packet Company, filed a demurrer to the complainant's said bill; that thereafter and on the 2d day of February, 1889, the complainant, by consent of the court, on motion duly made, filed his amended bill of complaint against the said defendants.

That afterwards and on or about the 11th day of April, 1889, a final decree was made and pronounced in the cause upon motion made by the defendant, The Hamburg-American Packet Company, wherein it was in substance adjudged and decreed as follows:
59 "Ordered that the notice of appearance entered in the above-entitled action on behalf of the defendant The Hamburg-American Packet Company be, and the same hereby is, amended as of the date of filing said notice of appearance *nunc pro tunc* by inserting in said notice of appearance the following words, to wit:

"And you will please take notice that the said appearance of the defendant The Hamburg-American Packet Company herein is not made generally, but specially and for the specific and only purpose of moving to set aside the alleged service of the *subpœna ad respondendum* upon it through its alleged agent, Henry R. Kunhardt, Sr., and to dismiss the bill of complaint herein as against it because of lack of jurisdiction and for the purpose of procuring the dismissal of said bill as against it for lack of jurisdiction by motion, demurrer, or plea, as it shall be advised.

"And it is further ordered, adjudged, and decreed that the service of the *subpœna ad respondendum* in the above-entitled action upon the defendant The Hamburg-American Packet Company be, and

the same hereby is, set aside and quashed; and it is further
60 ordered, adjudged, and decreed that the bill of complaint herein be, and the same hereby is, dismissed as against the said Hamburg-American Packet Company."

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court and the bill, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed with costs and such other decree made as to the said Supreme Court shall seem just.

Dated May 23d, 1889.

DEMING & LOGAN,
Solicitors for Appellant.
SALTER STOWES CLARK,
Counsel.

61 (Endorsed:) Circuit court of the United States, southern district of New York. Friedrich Hohorst, complainant, against Hamburg-American Packet Company, defendants & appellees. Petition of appeal. Deming & Logan, appellant's solicitors, No. 58 William street, New York city. The within appeal is hereby allowed. E. Henry Lacombe. U. S. circuit court. Filed May 25, 1889. John A. Shields, clerk.

62 Circuit Court United States, Southern District of New York.

FRIEDRICH HOHORST, Complainant and Appellant,
against
HAMBURG-AMERICAN PACKET COMPANY, Defendant and Ap-ellee. } In Equity.

Know all men by these presents that we, Clarence Kenyon, of 170 St. Marks avenue, Brooklyn, N. Y., and George W. Kenyon, of 842 Carroll street, in the said city of Brooklyn, are held and firmly bound unto the above-named Hamburg-American Packet Company in the sum of two hundred and fifty (250) dollars, to be paid to the said Hamburg-American Packet Company; for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, and administrators, jointly and severally, *formally* by these presents.

Sealed with our seals and dated the 22d day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

63 Whereas the above-named Friedrich Hohorst has prosecuted his appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York against him and in favor of the said Hamburg-American Packet Company:

Now, therefore, the condition of this obligation is such that if the above-named Friedrich Hohorst shall prosecute his said appeal to effect and answer all costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

CLARENCE KENYON. [L. S.]
GEO. W. KENYON. [L. S.]

Sealed and delivered and taken and acknowledged this 23d day of May, 1889, before me—

RIGNAL DUCKETT WOODWARD.

64 UNITED STATES OF AMERICA, }
Southern District of New York. }

Clarence Kenyon and George W. Kenyon, being duly and severally sworn, depose and say each for himself that he is worth the sum of five hundred dollars over and above all his just debts and liabilities and exclusive of property exempt by law from execution.

CLARENCE KENYON.
GEO. W. KENYON.

Sworn to before me this 23 day of May, 1889.

RIGNAL DUCKETT WOODWARD,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) Circuit court United States, southern district of New York. Friedrich Hohorst, complainant & appellant, *vs.* Hamburg-American Packet Company, defendant & ap-ellee. Bond
65 for costs on appeal to Supreme Court. Deming & Logan, solicitors for complainant & appellant. The within bond is hereby approved as to form and sufficiency. E. Henry Lacombe. U. S. circuit court. Filed May 24, 1889. John A. Shields, clerk.

66 Circuit Court of the United States, Southern District of New York.

FRIEDRICH HOHORST, Complainant, *against* HAMBURG-AMERICAN PACKET COMPANY. } Affidavit of Service on Person in Charge.

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York,* } *ss:*

Salter S. Clark, being duly sworn, says that he is of the age of 21 years and upwards; that on the 25th day of May, 1889, between the hours of 10 a. m. and 11 a. m., he served a copy of the annexed citation and petition of appeal on Walter D. Edmonds, the solicitor for the defendant, The Hamburg-American Packet Company, in the above-entitled action, at his office, at Temple court, in the city of

New York, by leaving the same with a person in charge of said office, said solicitor being absent therefrom at the time of said service, and that he exhibited the annexed originals to the said person of said service.

67 Dated the 25th day of May, 1889.

SALTER S. CLARK.

Sworn to before me this 25th day of May, 1889.

RIGNAL DUCKETT WOODWARD,
[SEAL.] *Notary Public, N. Y. Co.*

68 By the Hon. E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York.

To the Hamburg-American Packet Company, Greeting:

Whereas Friedrich Hohorst has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States in and for the southern district of New York, made in favor of you, the said Hamburg-American Packet Company, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, District of Columbia, on the second Monday of October, 1889, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 23d day of May, 1889.

R. HENRY LACOMBE.

69 [Endorsed:] Circuit court of the United States, southern district of New York. Friedrich Hohorst, complainant, against Hamburg-American Packet Company, defendant. Citation on appeal. Deming & Logan, appellant's solicitors, No. 58 William St., New York city. U. S. circuit court. Filed May 25, 1889. John A. Shields, clerk.

70 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

Seal of U. S. Circuit Court, South. Dist. New York.

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to sixty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Friedrich Hohorst, complainant & appellant, against Hamburg-American Packet Company, defendant & appellee, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the said United States the one hundred and fourteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 13,710. S. New York C. C. U. S. No. 134. Friedrich Hohorst, appellant, *vs.* The Hamburg-American Packet Company. Filed October 8, 1889.

148 U.S. 262

FILED.
NOV 18 1892
JAMES H. McKENNEY,
CLERK.

APPELLANT'S BRIEF.—CASE No. 13,710.

Supreme Court

OF THE UNITED STATES.

FRIEDRICH HOHORST,
Complainant and Appellant,

against

THE HAMBURG-AMERICAN PACKET COMPANY,
Defendants and Appellees.

APPELLANT'S BRIEF.

LOGAN, CLARK & DEMOND,
Solicitors for Appellant.

SALTER S. CLARK,
Counsel.

New York:
HAMILTON STEAM PRINT, 12 Barclay St. Telephone, 67 Cortlandt.

1892.

Supreme Court

OF THE UNITED STATES.

FRIEDRICH HOHORST,

Complainant and Appellant,

against

THE HAMBURG-AMERICAN PACKET COMPANY,

Defendants and Appellees.

STATEMENT OF CASE.

This appeal is from a final decree of the Circuit Court of the United States for the Southern District of New York, made upon motion dismissing complainant's bill as against the Hamburg-American Packet Company. The ground of such dismissal was that the defendant Company was not an inhabitant of the district in which the suit was brought, under the act of March 3, 1887.

The following are the proceedings and papers in the case upon which the decree is based.

September 5, 1888, original bill filed for infringement of patent (*fol. 3*).

September 17, 1888, subpœna served on Henry R. Kunhardt, Sr., a member of Kunhardt & Company, the general agents for the Hamburg-American Packet Company in this country (*fol. 2*).

November 5, 1888, defendant Company filed its general appearance (*fol. 12*).

November 27, 1888, defendants' time to answer or plead extended by consent (*fol. 43*).

December 18, 1888, defendant files demurrer to bill upon following grounds: (1) that the causes of action against the several defendants are distinct and unconnected, and hence that the bill is multifarious; (2) that the bill does not "state a case entitling complainant to any relief, because it appears by the bill that the Court had no jurisdiction of the defendant for the purpose of entertaining such a suit;" and (3) for "divers other good causes of demurrer appearing in the said bill of complaint" not otherwise specified (*fol. 13*).

December 24, 1888, motion by complainant to amend bill (*fol. 17*).

January 7, 1889, motion by defendant to dismiss the bill (*fol. 44*).

January 31, 1888, complainant's motion to amend granted; defendants' motion to dismiss denied (*fols. 21* and *44*).

February 2, 1889, amended bill filed (*fol. 23*).

February 16, 1889, defendants serve notice of final hearing upon the bill of complaint and demurrer (*fol. 44*).

February 23, 1889, defendant moves to amend its general appearance into a special appearance for the purpose of moving to dismiss on the ground of non-jurisdiction of the person; and also moves to dismiss (*fol. 28*).

April 1889, order granted that unless complainant withdraws his amended complaint, the defendants have leave to amend their general appearance into a special appearance, and that the case be dismissed (*fol. 50*).

April 11, 1889, decree amending the general appearance into a special appearance, and dismissing the bill as to the Hamburg-American Packet Company (*fol. 53*). The appeal is from this decree.

The defendants are the Hamburg-American Packet Company and several individual defendants, members of the firm of Kunhardt & Company, the general agents for said Company, in this country.

The only difference between the general bill and the amended bill, is the insertion of the word "jointly" in the allegation of defendants' infringement; and the insertion of an allegation showing the relation of the Hamburg-American Packet Company to the individual defendants (*fols. 17, 21 and 22*).

Upon the motion to dismiss, the statements as to the position of the Hamburg-American Packet Company in this country were presented as follows:

(1). The amended bill alleged as follows (*fol. 25*):

> "Your orator further states, that all of the defendants above named are inhabitants of the City and County of New York; that the defendant, the Hamburg-American Packet Company, has its principal business office in this country located in the City and County of New York; that the defendants, Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens and William Koester are, and during the time of the infringement above set forth were, copartners under the firm name of Kunhardt & Company, and as such copartners are, and were, the agents and managers of the business of the Hamburg-American Packet Company in this country, and have their principal office as such located in the City and County of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have cooperated and participated in all of said acts and infringements."

(2). The affidavit of R. J. Cortis alleged that the Company was incorporated in Europe, and had its principal office and place of business in Germany; that the residence of its directors and stockholders was in Germany; and that as he understood the

meaning of the term, the Company was not an inhabitant of New York (*fol. 29*).

(3). The affidavit of Arend Behrens, one of the defendants, a member of Kunhardt & Company, alleged that Kunhardt & Company were the agents for the Hamburg-American Packet Company; that the Hamburg American Packet Company advertised that it had an office in New York City; that such office was the office of Kunhardt & Company, which was, however, rented by Kunhardt & Company, and in their control; and that in such office, and by Kunhardt & Company, as such agents, the usual monetary and financial transactions of the Company were conducted; but that the Company had its docks, and landed its steamers in New Jersey (*fol. 41*).

SPECIFICATION OF ERRORS.

The Court below erred in dismissing the bill, for the following reasons:

(1). Because the defendant, by appearing generally and demurring to the bill, had waived its personal exemption (if any).

(2). Because the defendant being a European corporation was not within the meaning of the act, and hence could be sued, so far as jurisdiction of its person was concerned, in any district.

(3). Because the defendant, if within the meaning of the act, was an inhabitant of the Southern District of New York, and

(4). Because the decision should not have been made upon motion in any event.

BRIEF.

I. — The defendant, by appearing generally and submitting its whole case to the Court by demurrer, waived any right to object to the Court's jurisdiction over its person.

The provision of the statute is as follows:

> "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; and where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This prohibition does not affect the general jurisdiction of the Court. It is a privilege or exemption personal to a defendant, which he may waive or not as he pleases. This has been decided so often in this Court that citations from authorities are not necessary (*ex parte* Schollenberger, 96 U. S., 369).

Any submission of himself, or the merits of his case to the Court, is a waiver of the personal exemption. To take advantage of it the defendant must raise that point, and that point only, and raise it before he does anything else in the case. A general appearance, whether after service of subpœna or voluntary, waives it. The character of the cause of action makes no difference. An appearance is not an appearance to a particular bill of complaint, but to any complaint which the complainant may make. If the defendant does not want to submit himself to that Court, he must stay out. If he comes in, the question of jurisdiction of the person is at an end.

Here the defendants not only appear generally (*fol. 12*), but obtain an extension of time to answer

(*fol. 43*), file a demurrer raising the question of multifariousness, want of equity and "divers other good causes of demurrer" (*fol. 13*), and give notice of hearing upon such demurrer (*fol. 44*). The case, therefore, falls directly within the following decisions of the Supreme Court:

Jones *v.* Andrews, 10 Wallace (77 U. S.), 327, was a suit brought in the Circuit Court of West Tennessee; neither the plaintiff nor the defendant being citizens of that State. The defendant appeared and immediately made a motion to dismiss the bill upon two grounds—first, that it did not show facts in relation to citizenship or residence of the defendant sufficient to give the court jurisdiction; second, that it showed the complainant had an adequate remedy at law. *Held*, the demurrer waived the personal exemption. The opinion says:

> "Whether, if he had made the motion on the first ground alone, he would have waived his personal exemption, it is not necessary to decide; *his moving to dismiss for want of equity was clearly a waiver*, and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court dismissing the bill for want of jurisdiction must be reversed."

St. Louis *v.* McBride, 141 U. S., 127, decides exactly the same question in the same way. In this case a corporation of Missouri was sued in the western district of Arkansas. It did not appear whether the appearance was voluntary or after service. The fendant demurred on three grounds: (1), Because the court had no jurisdiction of the person of the defendant; (2), because the court had no jurisdiction of the subject-matter of the action; and (3), because the complaint did not state facts sufficient to constitute a cause of action. *Held*, that the demurrer was a waiver of the personal exemption, the opinion (by Mr. Justice Brewer) saying:

> "Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the action was one of which the court could take jurisdiction, *such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought.*"

That a general appearance alone constitutes a waiver of the personal exemption is recognized in Shaw *v.* Quincy Mining Company, 145 U. S., 144, the opinion saying that as the appearance in that case was special, there was no question of waiver, and adding:

> "*Such as has been recognized where a defendant has appeared generally* in a suit between citizens of different States brought in the wrong district" (referring to Gracie *v.* Palmer, 8 Wheaton, 699).

In Gracie *v.* Palmer, 8 Wheaton, 699, Chief Justice Marshall says:

> "The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was a privilege of the defendant which he might waive by a voluntary appearance. If process was returned by the marshal, as served upon him within the district, it was sufficient; but that where the defendant voluntarily appeared in the court below without taking the exception,

it was an admission of the service and a waiver of any further inquiry into the matter."

II.—The amendment of the general appearance into a special appearance does not change the case.

First.—Amending the appearance does not amend the demurrer, or change its effect. The waiver accomplished by the demurrer remained, whether the appearance was amended or not.

Second.—A court of original jurisdiction has no power to allow a defendant to change his general appearance into a special appearance. Appearance relates solely to jurisdiction of the person, and a general appearance is a complete submission of the person to the Court. No one is compelled to appear, but, having done so, the fact is accomplished. He is in court. It completely changes the status. Rights instantly arise in the complainant of which the Court cannot deprive him. Jurisdiction of the person, like jurisdiction of the cause of action, once acquired cannot be surrendered; or, if it be, that is good ground of appeal. The subpœna says, "you are hereby commanded to appear;" the defendant obeys the command; and that is an end of the matter.

In Creighton *v.* Kerr, 87 U. S., 8, which was a case begun by attachment, the opinion says:

> "A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding *in rem;* this result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. * * * * The appearance gives rights and benefits in the conduct of a suit, to destroy

> which, by a withdrawal, would work great injustice to the other party. Such was the case of Eldred *v.* Bank."

In Eldred *v.* Bank, 12 Wallace (84 U. S.), 545, the defendant had filed a plea, and had afterwards withdrawn the same without objection from the plaintiffs. The question in the case was whether the judgment thereafter entered by the plaintiffs was a personal judgment against that defendant, he not having been served with process in the beginning. The Court (Mr. Justice Miller delivering the opinion) says:

> "The filing of the plea was both an appearance and a defence. The case stood for the time between one term and another with an appearance and a plea. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the court. He was not, by the withdrawal of the plea, out of court."

The Court below refers, in its opinion, to the case of United States *v.* Yates, 6 How., 605, as allowing a general notice of appearance to be amended so as to make it special. His Honor has, however, misapprehended this case. It is a case directly in our favor upon this very point. It holds that the appearance of the party, once made, cannot be withdrawn, although the attorney, under special circumstances, may be allowed to withdraw. This decision was made with reference to a citation on appeal, and, as the opinion states, the reason for it is even stronger in the case of courts of original jurisdiction. Chief Justice Taney, in the opinion, says:

> "Upon the affidavits filed the Court will permit the attorney who has appeared for the appellees to withdraw his appearance. *But this leave will not authorize a motion to dismiss for want of a citation*, nor for mere ir-

> regularity in its service, providing the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, *and he cannot afterwards withdraw it.* . . . The serious objections which often exist to permitting an attorney to strike out his appearance for a defendant in the court exercising original jurisdiction do not apply in an appellate court."

Third.—Even if the Court had power to amend the appearance, there was no case made here for doing so. The defendant states that having raised the question of non-jurisdiction of the person, by his demurrer to the original bill, this objection was taken away by the filing of the amended bill. The trouble with this claim is that the demurrer instead of raising the objection had really waived it. The amended bill, therefore, did not change the situation. Had we gone to hearing on the original bill and the demurrer, that point could not have been raised. The labored explanation (*fol. 30*), of why a general appearance and a demurrer were filed, is wholly immaterial.

As a matter of fact this motion was merely a subterfuge to get rid of the effect of an act deliberately done but repented of afterward. The defendant knew, as soon as the subpœna was served, whether he wished to be sued in the Southern District of New York. It was not necessary for him to see the bill, and it made no difference what the bill contained. If it had been a suit at law instead of in equity, there would have been (in many States) no bill filed prior to appearance.

It is no answer to our position here that if we had waived our amended bill, and gone back to the original bill, the Court would have retained jurisdiction. We were entitled to have it retain jurisdiction in any event. In addition to that it would

have been unfair to compel us to give up an amended bill which contained an amendment about joint infringement, in addition to the amended allegations as to inhabitancy.

III.—The exemption of a party from suit, except in the district of which he is an inhabitant, does not apply to non-resident aliens or foreign corporations.

As to corporations incorporated in one State and sued in another, it has been finally settled, after much discordant decision in the circuit courts, that a corporation incorporated in this country can be an inhabitant, under the meaning of the Act, only of the State by which it was originally created (Shaw *v.* Quincy Mining Co., 145 U. S., 444). But so far as I have found, the question of a non resident alien or foreign corporation has never arisen before. It is distinctly saved out for future decision in the case of Shaw *v.* Quincy Mining Co., with the suggestion that the rule as to them may be different. The language of the Court is as follows:

> "This case does not present the question what may be the rule in cases against an alien or foreign corporation, *which may be governed by different considerations;* nor does it affect cases in admiralty, for those have been adjudged to be without the scope of the statute *in re* Louisville Underwriters, 134 U. S., 488. All that is now decided is that under the existing Act of Congress a corporation incorporated in one State only cannot be compelled to answer in a Circuit Court of the United States, held in another State in which it has its usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State."

As the case at bar is a patent suit, we do not come within the clause of the statute which allows suit to be brought in the residence of the complainant, since jurisdiction is not founded *only* on the fact that the action is between citizens of different States. Therefore this case presents clearly the question whether the first clause of the statute was intended by Congress to apply to non-resident aliens or foreign corporations. It says:

> "No civil suit shall be brought before either of said courts against any person, by any original process or proceeding. in any other district than that whereof he is an inhabitant."

Did Congress mean to include under the phrase "any person," non-resident aliens or foreign corporations?

The cases state that this provision was intended to prevent the hardship to a defendant which would result from compelling him to answer a suit away from home. The result of the interpretation contended for by the other side in this case would be the escape of all foreigners and foreign corporations from all liability in a vast number of cases; that, too, in spite of the Constitution, which says:

> "The judicial power shall extend to *all* cases, in law or in equity, arising under the laws of the United States, and to controversies between a State and the citizens thereof and *foreign* States, citizens or subjects."

and of the Revised Statutes, which say (Sec. 629):

> "A circuit court shall have original jurisdiction, as follows: 9th. Of all suits at law or in equity arising under the patent or copyright laws of the United States."

If this be the meaning of Congress, then this complainant cannot sue this defendant in any district in the United States; and as this is a case of

which the Federal courts have exclusive jurisdiction, he cannot sue in any State court. All the great steamship lines, which have been infringing this patent for years, would be exempt from liability. No suit on any cause of action arising under the United States laws—patents, copyrights, customs, etc.—causes which the Federal courts were specially instituted to hear—could be brought by any one against a non-resident alien or foreign corporation. The numerous foreign insurance, steamship, cable, land and trading companies, could maintain unlimited business relations here, and in them wholly ignore all Federal laws and penalties.

On the other hand, these same courts would be open to the same foreigners, as complainants, on similar causes of action. On causes of action where the Federal court had concurrent jurisdiction with the State court, the citizen could sue the foreigner in a Federal court by suing in the district of his own residence; or, if he sued in the State court, the foreigner could remove the case into the Federal court; but where the Federal court had exclusive jurisdiction, the citizen could not sue the foreigner at all. No non-resident alien could be sued by attachment or arrested, though it is against just such persons that attachments and arrests are most needed.

It is not reasonable to suppose that Congress really intended any such result. Nor do the words used compel such a construction. The whole law, of which this provision is a part, is one giving, not prohibiting, jurisdiction to the Circuit Courts, and this particular clause does not mean to say as to any person whatsoever, that he shall not be sued at all, but simply to provide *where he shall be sued.* Omitting words not involved, the clause reads: "No suit shall be brought against any person, in any other district than that whereof he is an inhabitant." It is not at all unreasonable to say that some such phrase as "an inhabitant of the United

States" is understood after "person." On the contrary, the last clause, "whereof he is an inhabitant," clearly implies that the supposed defendant —the "any person" intended—is one having a home district in the United States.

In Sec. 11 of the Judiciary Act of 1789, and Sec. 739 of the Revised Statutes, which were the law upon this subject up to 1875, the phrase stood:

> "No civil suit shall be brought . . . against *an inhabitant of the United States* in any other district than that whereof he is an inhabitant, or in which he shall be found."

The Statute of 1875 substituted "any person" for "an inhabitant of the United States;" but this very statute proves that in this change Congress did not mean to take away the jurisdiction of the Circuit Courts over foreigners, by permitting suit to be brought wherever the defendant may be *found*. The Supreme Court, speaking of this, has said (134 U. S., 491):

> "The provision of Section 11 of the Act of 1789, embodied in Section 739 of the Revised Statutes, was re-enacted, *with no material alteration*, in the Act of March 3, 1875, Chap. 137, Section 1."

This construction is no more liberal than this very clause has already undergone at the hands of this Court in the two cases of Atkins *v.* Disintegrating Co., 18 Wallace (85 U. S.), 272, and Louisville Underwriters, 134 U. S., 488. These cases held that Congress did not intend, under the term "civil suit," and "any process or proceeding," to include admiralty cases, even where they were proceedings *in personam*.

The Atkins case was one brought by libel in the Eastern District of New York against a corporation

of New Jersey. Jurisdiction of the person was obtained, not by service of process, but by attachment of the defendant's property. *Held*, that the Court had jurisdiction. The opinion uses the following language, (*page 301:*)

> "It may be admitted that an admiralty case is a civil suit in the general sense of that phrase, but that is not the question before us. It is whether that is the meaning of that phrase as used in this section. The intention of the lawmaker constitutes the law. *A thing may be within the letter of a statute and not within its meaning*, or within its meaning though not within its letter. In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section, statute, or series of statutes *in pari materia*. The general language found in one place may be restricted in its effect by the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intention of the enactment.

In the Louisville Underwriters' case, a corporation of Kentucky, was sued in a district of Louisiana, by a libel in admiralty *in personam*. There was no attachment, but jurisdiction was obtained by service of process upon an agent of the Company in that district. *Held*, the Court had jurisdiction. The opinion (by Mr. Justice Gray) quotes, with approval, the reasoning in the Atkins case, adding, (*page 493:*)

> "To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons, or his goods or credits attached, would not only often put him to great delay, inconvenience and expense, but would, in many cases, amount to a denial of justice."

It is to be noted that the Atkins case arises under the provision as it was prior to the Statute of 1887, but that the Louisville Underwriters' case arises under the Statute of 1887, which struck out the provision that a defendant might be sued where he could be found. The Court says (page 492): "This change, far from weakening the reason of the decision in Atkins *v.* Disintegrating Company, above cited, greatly strengthens it."

In Societe Fonciere *v.* Milliken, 135 U. S., 304, the defendant was a foreign corporation, and the point in the case at bar was not directly made or passed upon, but the opinion indicates what the decision would have been on that point, in the following words, Mr. Justice Brewer writing the opinion:

> "In what county suit may be brought is determined by other sections, which need not be cited here, as the right to sue in the Federal court is not questioned. So, the court having jurisdiction of the cause of action, service might be made upon the local agent representing the society. Du Bellet was unquestionably such agent, and service upon him was sufficient to bring the society into court."

If, therefore, the act of 1887 does not apply to foreign corporations, this defendant, the Hamburg-American Packet Company, could have been sued in any Federal district; and the Circuit Court for the Southern District of New York had jurisdiction of its person, both because service was made there, and because it appeared in the action.

IV.—If within the Act of 1887.

The opinion of Judge Lacombe, in the court below does not clearly indicate whether the decision was based upon the defendant being a foreign corpora-

tion, or because he considered that it was an inhabitant of the district of New Jersey.

If it be held that non-resident aliens and foreign corporations are within the act of 1887, it seems to follow inevitably, under the reasoning in Shaw *v.* Quincy M. Co., 145 U. S., 444, that they cannot be sued in any Federal court. I do not see how they can be inhabitants of a foreign country and of this country also. To be sure, the Supreme Court decisions, so far, have been made with reference to domestic corporations only; and they must have a domicile in some State; but I see no way of stopping the logic at that point.

In this light it is useless to consider whether the defendant, the Hamburg American Packet Company, can be more properly considered an inhabitant of New York or of New Jersey. It was either not an inhabitant of the United States at all, and therefore (if the law applies), cannot be sued anywhere; or else, the law does not apply, and it can be sued anywhere.

If, however, there is a way of holding foreign corporations inhabitants of the United States, then I submit that under the facts shown the defendant here was an inhabitant of the Southern District of New York. The amended complaint (*fol. 25*), alleges that Kunhardt & Co. were its general agents in this country, and that their office as such was in the City of New York. This was not denied by the defendant's affidavits, on which this motion was based, and these affidavits specifically allege (*fol. 41*), that the Company advertises that it had an office ni the City of New York, and that the usual monetary and financial transactions of the Company were conducted there. Its steamers, however (so they say) came to New Jersey. It would seem more proper to put the habitation of a corporation where the head rather than where the body is—that is, where the actual responsible managers do the business, and where the books are kept, rather than where some of the property lies and where the longshoremen wheel their trucks.

V.—The bill should not have been dismissed upon motion.

If it is to be held that the defendant, as a foreign corporation, is not amenable to process in any Federal court, then, of course, it makes no difference whether the point is raised on motion or upon a trial. But if the decision is to turn upon whether the Southern District of New York, or some other district, is the proper one, then it is unjust to the complainant to decide it upon motion. If the question is to turn upon the character of the business done in the two places,. or upon the character of the agency of the individual defendants for the Company, &c., the complainant has virtually had no opportunity to meet the case.

The complaint alleges that the defendant, The Hamburg-American Packet Company, is an inhabitant of the City of New York and has its principal office there. If those allegations are material, and are to be contested, they should be contested by answer just as much as the allegation that the complainant is the owner of the patent. Otherwise the case is virtually a trial on affidavits. The complainant has had no opportunity of cross examination, and, in fact, no opportunity to learn the real facts, which are altogether in the possession of the defendants.

The degree of uncertainty attaching to such a method of trying the case is illustrated by an allegation in one of the defendant's affidavits (*fol. 41*), that "said Company advertises that it has an office in the City of New York," while in another of defendant's affidavits the contradictory statement is made (*fol. 29*) that, "up to the time of the commencement of this cause, said Company had never had an office in the City of New York."

VI.—The decree should be reversed, and the case remanded to the court below, upon the usual terms.

SALTER S. CLARK.

148 US 262

Supreme Court, U.S.
FILED.
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. 134.

FRIEDRICH HOHORST,
Appellant,

vs.

THE HAMBURG-AMERICAN PACKET COMPANY ET AL.

APPELLEES' BRIEF.

WALTER D. EDMONDS,
Of Counsel for Appellees.

C. G. Burgoyne, cor. Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1892.

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THE HAMBURG-AMERICAN PACKET COMPANY ET AL.

APPELLEES BRIEF.

Statement of Case.

Some errors in appellant's statement require correction.

This appeal is not from a final decree. It is taken from an order (53*) setting aside service of *subpœna ad respondendum* on The Hamburg-American Packet Company, on the ground that, not being incorporated under the laws of the State of New York, and not having its principal place of business within the United States (29), and having a place of business in the State of New Jersey (41), and not in New York (29), it is not an "*inhabitant*" of the Southern District of New York.

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* Note:—Figures in brackets refer to paging of the original, being marginal figures in the printed record.

This suit is still pending undetermined as against said company's co-defendants.

Said subpœna was not served upon "*general* agents" of said company. The only allegation in the record to that effect is the unverified conclusion of the United States Marshal endorsed upon the subpœna (2). It is undisproved that the agency of Kunhardt & Company was limited to represent the defendant corporation in its fiscal business (41). Though appellant alleges that defendants' time to answer or plead was extended by consent to November 27th, 1888, he omits to state the further material fact that the said consent embraced a like extension of time to make such motion as defendants should be advised.

Appellant's statement of facts is erroneous in alleging that :

> "The only difference between the original bill and the "amended bill is the insertion of the word 'jointly' in the "allegation of defendants' infringement; and the insertion "of an allegation showing the relation of the Hamburg-American Packet Company to the individual defendants (fols. 17, 21 and 22).

This statement omits all mention of that difference between the two bills which is the most germane to the present inquiry, to wit : that the only allegation concerning the residence or habitation of the defendant company contained in the original bill was the statement that it was "doing business in the City of New York," (3) whereas the amended bill recites that

> "All the defendants * * * *are inhabitants* of the City "and County of New York; that the defendant The Ham-"burg-American Packet Co. has its principal business office "in this Country located in the City and County of New "York" (25).

Appellant's statement also omits the undisputed fact that the defendant company's

> "docks where all its steamers land and take and discharge

> " cargo are situated in the State of New Jersey, and that
> " there also is the office of the company for the transaction
> " of the matters immediately connected with all its actual in-
> " dustrial operations in this country; * * * that by Kun-
> " hardt & Company as its agents are conducted in New York
> " its usual monetary and financial transactions, but that
> " all its physical business within the United States is con-
> " ducted within the State of New Jersey."

And therefore none of the infringements complained of, viz, by the use of a net for handling cargo, could have occured elsewhere than in the latter State (41,42). These facts were also found by the Court below (49).

Except as above shown, the appellants statement is substantially correct.

It should be noted in conclusion that the complainant patentee waited until twenty-three days, only, prior to the expiration of his patent (1, 4) before bringing suit against this non-resident alien corporation to recover damages the accumulation of which might have been prevented at any time by injunction.

POINT FIRST.

The sole question presented for review is whether the Circuit Court acquired jurisdiction by service of its subpœna upon this European corporation.

On this appeal no inquiry is admissible as to propriety of the order of the Circuit Judge amending defendants general into a special appearance. Such order was discretionary and is not appealable for there was no abuse of discretion. It constituted in no sense a final decree. Its character is not changed by the fact that it was precedently incorporated into the order, or

" decree," setting aside service of subpœna on defendant and dismissing bill.

Moreover, there is really no final decree here. The record implies that the suit is still pending and undetermined as against the other joint defendants. It is a grave question whether the appeal should not be dismissed for lack of jurisdiction by this Court, and the appellant relegated to his remedy by mandamus to compel the Circuit Court to take jurisdiction. Such would certainly seem to be the better practice.

But, assuming that an order amending a pleading or a notice of appearance is appealable to this Court, even then there was no error by the Court below.

It is settled that a Court of original jurisdiction has power, in its discretion, to amend party's notice of appearance, and even to strike it out. So held by this Court sitting as a Court of original jurisdiction in a suit between States presenting circumstances equivalent to those at bar.

State of Rhode Island vs. State of Mass., 13 Pet., 23.

See, also, enunciating the same principle :

U. S. vs. Yates, 6 How., 605, 608.
Danner vs. Adams, 13 Ill., 691.
Michew vs. M'Coy, 3 Watts & Sarg., 501.
Large vs. State Bank, 6 Black., 557.

The exercise of this power of amendment over notices of appearance, is common practice, as illustrated for instance in Shaw vs. Quincy Mining Co., 145 U. S., 444 (erroneously cited to contrary effect by appellant), where general appearance of a defendant corporation was converted by Court into special appearance for the purpose of enabling it to move to dismiss because of non-jurisdiction (see pages 9 and 10 of the Record in this Court of said last-mentioned cause).

Besides, the obligation of a general appearance has been by the Court strictly limited to cases in which it has been followed by "*pleading on the merits.*"

St. Louis Ry. Co. vs. McBride, 141 U. S. 131.
Toland vs. Sprague, 12 Petters, 300, 330.
Pollard vs. Dwight, 4 Cranch, 421.
Charlotte Natl. Bank vs. Morgan, 132 U. S., 141.
Fitzgerald Construction Co. vs. Fitzgerald, 137 U. S., 98.
Gracey vs. Palmer, 8 Wheaton, 699.

Nor was there any abuse of discretion herein in indulging defendant corporation by this amendment of its general into a special appearance. Under the circumstances presented by the record, it was abundantly justified by the precedent established in State of Rhode Island vs. State of Mass., *ante.* There this Court permitted the complainant to amend its bill, and thereupon, upon motion of counsel for defendant, leave was granted latter to withdraw its plea, and strike out its appearance in the suit. In the case at bar the original bill omitted to plead any facts tending to show that the defendant corporation was an inhabitant of the district. In view of such a bill defendant was willing to appear generally and try its objection to the jurisdiction by demurrer (31, 32). Complainant met the demurrer by obtaining the Court's indulgence to amend his bill. It was no more than the exercise of sound and equitable discretion to extend equal indulgence to defendant, who had thus, by what was substantially, if not actually, an artifice, been lured into entering a general appearance ; which, moreover, be it specially observed, the Circuit Court declined to amend, provided complainant should elect to stand on his original bill (51).

SECOND POINT.

Under Section 1 of Act of Congress of March 3, 1887, Chapter 373, as corrected by the Act of August 13, 1880, Chapter 866 (24 Stats., 352; 25 Stats., 433), defendant, a European corporation, is not, on the cause of action set up in the complaint, subject to the jurisdiction of the Court below.

The section in question reads as follows:

"That the Circuit Courts of the United States shall have "original cognizance, concurrent with the Courts of the "several States, of all suits of a civil nature, at common law "or in equity, wh the matter in dispute exceeds, exclusive "of interest and costs, the sum or value of two thousand "dollars, and arising under the Constitution or Laws of "the United States, or treaties made, or which shall be "made, under their authority, or in which controversy the "United States are plaintiffs or petitioners, or in which there "shall be a controversy between citizens of different States, "in which the matter in dispute exceeds, exclusive of inter- "est and costs, the sum or value aforesaid, or a controversy "between citizens of the same State claiming lands under "grants of different States, or a controversy between citizens "of a State and foreign States, citizens or subjects, in which "the matter in dispute exceeds, exclusive of interest and "costs, the sum or value aforesaid, and shall have exclusive "cognizance of all crimes and offenses cognizable under the "authority of the United States, except as otherwise pro- "vided by law, and concurrent jurisdiction with the district "courts of the crimes and offenses cognizable by them. "But no person shall be arrested in one district for trial in "another in any civil action before a Circuit or District "Court, and *no civil suit shall be brought before either of said* "*courts against any person by any original process or pro-* "*ceeding in any other district than that whereof he is an* "*inhabitant;* but, where the jurisdiction is founded only "on the fact that the action is between citizens of different "States, suit shall be brought only in the district of the "residence of either the plaintiff or the defendant; nor shall "any circuit or district court have cognizance of any suit,

"except upon foreign bills of exchange, to recover the "contents of any promissory note or other chose in action "in favor of any assignee, or of any subsequent holder, if "such instrument be payable to bearer, and be not made by "any corporation, unless such suit might have been prose- "cuted in such court to recover the said contents if no "assignment or transfer had been made; and the circuit "courts shall also have appellate jurisdiction from the "district courts under the regulations and restrictions "prescribed by law."

The language of this act, the proceedings attending its passage, and the decisions of this Court fix, with certainty, that Congress enacted it with intent to contract the jurisdiction of the Federal Courts.

Smith vs. Lyon, 133 U. S., 319.
In re Louisville Underwriters, 134 U. S. 488.

The expressed object of the bill (H. R., 241), which finally resulted in this act, was to amend §§ 1, 2, 3 and 10 of the Act of March 3, 1875. As this bill passed the House of Representatives, its amendment of Sec. 1 of said Act of 1875 provided, *inter alia*, that "no civil "suit shall be brought * * * against any person "* * * in any other district than that whereof he "is an inhabitant, *or in which he shall be found at the* "*time of serving process*, etc." Its amendment of Sec. 3 of said Act of 1875 provided that "the Circuit "Court * * * shall not take original cognizance "of any suit of a civil nature * * * between a "corporation created or organized by or under the "laws of any State and a citizen of any State in which "such corporation at the time the cause of action "accrued may have been carrying on any business "authorized by the law creating it, *except in cases aris-* "*ing under the patent or copyright laws*" * * * (Cong. Record, 49th Congress, 2d Sess., Vol. 18, Part 1, p. 612).

The Committee on the Judiciary reported the bill to

the Senate with amendments (Con. Rec., 49th Con., 2d Sess., Vol. 18, Part III., p. 2542). One amendment was to strike out the above words, "or in which he shall be "found at the time of serving process," etc.; another of said amendments was to strike out the entire clause partly quoted above as amendatory of Sec. 3 of said Act of 1875. The Senate adopted the amendments so reported. The House disagreed thereto. A Conference Committee, to which the disagreement between the Houses was referred, reported to each in favor of adopting the Senate amendments, and the act thereupon became a law accordingly (Cong. Rec., p. 2651).

The original Judiciary Act of September 24, 1789, provided, in this regard, that "no civil suit shall be "brought against *an inhabitant of the United States* by "any original process in any other district than that "whereof he is an inhabitant," etc. The same language was retained in Sec. 739 of the Revised Statutes. But the said Act of March 3, 1875, substituted for the above words "an inhabitant of the United States" the words "*any person.*"

And this modification was retained in the act in question.

From these facts it seems clear that Congress intended to strictly limit the jurisdiction to cases in which the defendant, irrespective of the question whether he was an inhabitant of the United States or not, was an actual inhabitant as distinguished from being found in the district in which suit was brought, and this, without exception of cases arising under the patent laws.

The restriction thus created did not, however, extend to the majority of cases, *i. e.*, those where the jurisdiction is founded only on the fact that the action is between citizens of different States. In these the suit could still be brought, as heretofore, in

either the district of the plaintiff's, or defendant's, residence.

It is believed to be authoritatively and fully settled both by common law, and by the repeated adjudications of this Court, that no corporation can be an "inhabitant" of any district which does not lie within the geographical limits of the State or country under the laws of which the corporation was organized.

Shaw vs. Quincy Mining Co., 145 U. S., 444.

It follows, therefore, as a logical and inevitable consequence, from the language of the act, as so interpreted, that, in this suit, in which, on the face of the bill, the jurisdiction is altogether founded on a fact other than that the action is between citizens of different States, viz., the fact of patent infringement, the defendant, alleged to be incorporated under the laws of the Kingdom of Hanover, is within the act, and not subject to the jurisdiction.

The act as it reads on its face, is free from ambiguity or uncertainty. It expresses as clearly as is within the power of language the simple idea that "*no* suit" shall be brought against "*any* person" in *any* district except such as he inhabits. His inhabitancy in a district is an essential prerequisite to jurisdiction over *any* person. Non-inhabitants of districts are, therefore, completely exempted from any suits in those districts. In a suit commenced in any district, the fact that the defendant is not an inhabitant of that district is, as soon as properly presented to the Court, fatal to the jurisdiction. It is immaterial and outside of the province or power of the Court to inquire what other districts the defendant inhabits, or whether he inhabits any district at all. Proven that the defendant does not inhabit the district of suit, and the facts on which depend the exclusion of the jurisdiction, are complete.

Whatever may be *surmised* as to the actual intent of Congress, its language has, by itself, as contained in

the act, a complete and definite meaning, involving no absurdity, nor any contradiction of, but rather complete accord with, the other parts of this restrictive statute.

That the meaning here contended for is not only the obvious one, but that which meets the approval of judicial criticism, is apparent from the following language of DEADY, J., in interpreting this section :

> " It is not probable that Congress intended to give a cor-
> " poration, the subject of a foreign state, engaged in business,
> " with a local habitation in the United States, the option of
> " suing a citizen of the United States in a national court,
> " and to deny such citizen having a controversy with or a
> " demand against such foreign subject engaged in business
> " in the United States, the corresponding privilege.
>
> " And, yet, if a corporation, the subject of a foreign State,
> " cannot become an inhabitant of this district, because it
> " cannot migrate here and become a citizen of the State,
> " *such result will follow.*"
>
> Miller vs. Mining Co., 45 F. R., 345.

No controversy arises here as to the meaning or interpretation of any special words, as did respecting the words " civil suit " in the admiralty cases of Atkin vs. The Disintegrating Co., 18 Wall., 272, and Louisville Underwriters, 134 U. S.,'488. For the purpose of applying the act to the case at bar, each word must be taken as already construed by this Court or in its usual English significance.

No rule is better established, is more important to the community, or has been more forciby expressed and applied by this Court than that, under such circumstances, this Act of Congress shall be construed to mean no more nor less than it has plainly expressed.

> " Words are the common signs that mankind make use
> " of to declare their intention to one another; and, when the
> " words of a man express his meaning plainly, distinctly and
> " perfectly, we have no occasion to have recourse to any
> " other means of interpretation. * * *
>
> " If it was a mistaken scheme, if its operation has proved
> " or shall prove to be more inconvenient than beneficial, the
> " remedy is with the people, not with the courts. * * *

> " Nor are we justified in resorting to strained construction " or astute interpretation to avoid the intention of the framers " of the Constitution, or the statutes adopted under it, even to " relieve against individual or local hardships. If unwise or " hard in their operation, the power that adopted can repeal " or amend and remove the inconvenience. The power to do " so has been wisely withheld from the courts, their func- " tions only being to enforce the laws as they find them " enacted."
>
> Lake Co. vs. Rollins, 130 U. S., 662, 671–673.

It is likewise well settled that it was within the power and solely within the discretion of Congress to lawfully enact, if so advised, such limitation upon the jurisdiction of the Circuit Courts as would wholly exempt alien corporations from their process.

> " The doctrine so often ruled in this Court that the " judicial power of the United States, although it has its " origin in the Constitution * * * is dependent for its " distribution and organization, and for the modes of its " exercise, entirely upon the action of Congress, who possess " the sole power of creating the tribunals (inferior to the " Supreme Court) for the exercise of the judicial power of " investing them with jurisdiction * * * and of with- " holding jurisdiction from them in the exact degrees and " character which to Congress may seem proper for the " public good. To deny this position would be to elevate " the judicial over the legislative branch of the Government, " and to give to the former powers limited by its own dis- " cretion merely * * * The courts of the United States " are all limited in their nature and constitution, and have not " the powers inherent in courts existing by prescription or " by the common law."
>
> Cary vs. Curtis, 3 Howard, 236–245.

The appellant contends that it is not at all unreasonable to say that some such phrase as " an inhabitant of the United States " is to be *understood* after " person " in the section in question (Brief, pp. 13 and 14). Undoubtedly his case depends upon such addition to the unambiguous present language of the act, but clearly

this is prohibited by precedent, and, besides, this very phrase formerly so incorporated, and for more than three-quarters of a century retained in the organic Judiciary Act of September 24, 1789, was deliberately expunged by Act of Congress of March 3d, 1875, Chapter 131, and the present words "*any* person" substituted therefor, and retained in the present act, thereby affording high evidence that Congress intended the restriction to apply, not only to inhabitants of the United States, but also to "*any person*," thus, necessarily, including aliens.

The apprehended evil results, of construing this statute to mean what it plainly says, are not nearly so great as appellant contends. Natural persons, though aliens, can readily acquire constructive residence and become "inhabitants" of districts. All aliens, including corporations, notwithstanding the act, still remain within the jurisdiction in admiralty (In *re* Louisville Underwriters, 134 U. S. 488).

The remedies against aliens continue, as perfect as against citizens, in all that numerous class of cases, constituting the great mass of litigation in which jurisdiction is founded only on the fact that the action is between citizens of different States, and the matter in dispute is of the statutory value.

It seems that no abridgment of the former jurisdiction over aliens would follow except in suits between aliens, and possibly in copyright and patent cases, while in the latter it seems that jurisdiction might be held to attach in all cases of patent infringement in which the bill sufficiently alleges the requisite diversity of citizenship, and that the damages exceed $2,000.

Assuming, however, that the literal meaning of the act abrogates the jurisdiction over alien corporations in cases arising under the patent laws in which the bill fails to disclose any other grounds of jurisdiction,

nevertheless, patentees would have abundant remedy by suit against the inhabitant agents of such corporation, without whose acts infringement could not be committed by the alien within the territory of the United States. Such agents would be liable to injunction, and also to respond in damages, and thus complete remedy afforded to the patentee for both the past and the future. If it be urged that the patentee may prefer as a defendant a solvent corporation to an insolvent agent, it may justly be answered that a diligent enforcement of the patentee's rights by injunction would prevent accumulation of damages, and that a suitor who, like present complainant, defers the enforcement of his rights until a few days before the expiration of his patent, is not entitled to consideration because of the magnitude of damages which his own laches has contributed to accumulate.

It is far from impossible that Congress, by refusing to except from the restriction of this act "patent causes" (see p. 7, 8, *ante*), and by extending it to "any person," may have actually intended (however unwisely) to afford to non-resident aliens, unacquainted with our local laws, unfavorably situated for receiving actual or constructive notice of our patents, some protection as against patentees who, like the complainant, stand by and refrain from suit until the last day on which the unwarned foreigner can continue adding to his damages.

But such inquiry into the motive of Congress is out of place; however ill-advised, however unintentional this exclusion of alien corporations, from jurisdiction, the act must stand for that only which the plain uninterpolated English of its language means, and the remedy for any resultant undesirable effect must be sought from Congress—not here.

POINT THIRD.

Should this Court hold that the jurisdiction of the Circuit Court over alien corporations is not affected by this Act of 1887–88, nevertheless there was no error below.

The record herein demonstrates that the pretended service of process upon the defendant corporation would have been insufficient to confer jurisdiction prior to the passage of the act in question.

The appearance herein of the defendant corporation must be taken to have been specially made for the sole purpose of moving to set aside the service of the Court's mandate (see Point First hereof). The return of service of the writ, made by the Marshal of the Southern District of New York, certifies as follows:

> "Within my district * * * I personally served the "within subpœna in equity upon the within-named de- "fendant, Hamburg-American Packet Company, by ex- "hibiting to Henry R. Kunhardt, Sr., general agent for said "company, the within original, &c." (2).

The bill of complaint on which this subpœna was filed makes no allegation or even suggestion of any kind that said Henry R. Kunhardt, Sr., was at any time such agent, or was ever connected in any way with the defendant corporation, or any of the other defendants (3, 10). He is not even alleged to have jointly infringed (6). The amended bill, filed after said service, alleged that Henry R. Kunhardt, Sr., was a copartner with the other natural person defendants, and that, "as such copartners, are and were *the agents* and man- "agers of the business of the company in this coun- "try, and have their principal business office as such "located in the City and County of New York."

On defendant corporation's motion to set aside service of process it proved by affidavit that ;—

> " It never had an office in the City of New York or at " any place within tha Southern District of New York " (29).
>
> " The actual facts are that the said company has its docks " where all its steamers land and take and discharge cargo, " situated in the State of New Jersey. There also is the " office of the company for the transaction of the matters " immediately connected with all its actual industrial opera- " tions in this country.
>
> " Said company advertises that it has an office in the City " of New York, which is the office of the firm of Kunhardt " & Co., and entirely under their control.
>
> " It is in fact the office of Kunhardt & Co., agents for the " Hamburg-American Packet Company and in said office of " Kunhardt & Co., and by Kunhardt & Co., as agents, *the* " *usual mometary and financial transactions* of said Ham- " burg-American Packet Company are conducted. All the " actual physical business of said Hamburg-American ' Packet Company within the United States, however, is " conducted within the State of New Jersey, as aforesaid.
>
> " All operations of loading and unloading the cargo from " said Hamburg-American Packet Company's vessels in this " country are performed in New Jersey, as aforesaid, under " the immediate direction and control of a superintendent " especially employed and appointed by the Hamburg-Amer- " ican Packet Company for that purpose, and whose salary " or compensation is paid by said company, and with the " direction and details of whose supervision of said loading " and unloading the firm of Kunhardt & Co. have no concern " and exercise no control " (41, 42).

The Marshal's return being inconclusive and open to impeachment by affidavit (St. Clair vs. Cox, 106 U. S., 350, 359), it was incumbent upon complainant to oppose the motion to dismiss the writ by counter-affidavits sufficient to put these facts in issue. Complainant did not avail himself of this opportunity; his only opposing affidavit was confined to a description of prior proceedings had in the cause, and on which solely he relied to defeat complainant's motion (43, 44).

Under these circumstances, the allegations of his bill being unproven, all the above facts alleged by the

defendant corporation must be taken as true and as admitted for the purposes of the motion, and the Court below accordingly found as matter of fact as follows:

> "The Hamburg-American Packet Company is incorporated under the laws of a European government. Its principal offices and place of business are, and always have been, situated in the City of Hamburg, Germany, all its directors and stockholders being residents of the German Empire. The business of the said company is that of an ocean carrier between foreign ports and the port of New York. Its financial agents in this country are Kunhardt & Co., and it advertises their office as its office in New York. By Kunhardt & Company as its agents here *its usual monetary and financial transactions are conducted*, but the piers to which its vessels come are in New Jersey. There it receives and discharges cargo, and maintains an office for the transaction of the matters immediately connected with its actual industrial operations in this country.
>
> "Upon this state of facts the defendant The Hamburg-American Packet Company cannot be considered an inhabitant of the Southern District of New York" (48, 49).

Bearing in mind that the only cause of action set up herein is infringement of letters patent for an improvement in slings for packages (3), by making, using and allowing others to use (6, 24), it seems clear that the service of the writ upon a mere fiscal agent was insufficient to confer jurisdiction over the corporation.

The wholesome principle has been recognized by this Court that the agents of a corporation, outside of the territory where it inhabits, shall not be deemed to represent it *except to the extent of their agency.*

> "Serving process on its agents in other States *for matters within the sphere of their agency* is, in effect, serving process on it, as much so as if such agents resided in the State where it was created."
>
> St. Clair vs. Cox, 106 U. S., 350, 355, 356.

To hold the service herein to be sufficient would result in the manifest hardship of rendering every alien

carrier corporation liable to suit in any District of the United States in which one of its financial, or "ticket agents," could be found, and this on causes of action arising out of infringement of patents by other agents in other districts; that is to say, the present suit for infringement in New Jersey might have been commenced by service of the writ upon the defendants' financial agents in California as well as here.

But appellant contends against determining upon affidavits either the district in which the defendant corporation is amenable to process, or the character of the agency of the person served with the writ. The answer to this is twofold; first, there is no issue of fact relating to these questions left to try, the facts being admitted by the complainant's neglect or inability to traverse or qualify them by counter-affidavits; second, these questions as to jurisdiction cannot be raised after defendant has pleaded, but must be determined preliminarily, if ever, and, therefore, necessarily upon affidavits, or upon proofs taken for that purpose specifically on reference to a Master.

FINALLY.

The appeal should be dismissed, or the order or decree of the Court below affirmed, upon the usual terms.

Respectfully submitted by
WALTER D. EDMONDS,
Of Counsel for Appellees.

Transcripts
of
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(Lacks 157
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